Supreme Court of the United States

OCTOBER TERM, 1966

No. 1083

UNITED STATES, PETITIONER

vs.

R. B. RANDS, ET UX.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 63-380

[File Endorsement Omitted]

UNITED STATES OF AMERICA, PLAINTIFF

vs.

JAMES FOX and EMMA FOX, husband and wife; GEORGE L. FOX and LUCILE H. FOX, husband and wife; A. H. HARDING and ESTHER E. HARDING, husband and wife; H. G. GOSNEY, doing business as Umatilla Sand and Gravel Company; GEORGE SHANE, JR., a single man; R. B. RANDS and JOSEPHINE RANDS, husband and wife; FERDINAND EMBERGER and JANE DOE EMBERGER, husband and wife; ROYAL H. RANDS and LOUISE RANDS, husband and wife; WEST EXTENSION IRRIGATION DISTRICT; NORTHERN PACIFIC RAILWAY COMPANY; FANNIE SLEVIN, a single woman; CLYDE HOYT and NELLIE HOYT, husband and wife; JAMES F. MCMILLIN and MADELINE MCMILLIN, husband and wife; ROBERT HOYT and THULA HOYT, husband and wife; MARVIN SIMMONS, and NORMA J. SIMMONS, husband and wife; STATE OF OREGON; GILLIAM COUNTY, MORROW COUNTY, SHERMAN COUNTY, AND UMATILLA COUNTY, municipal corporations and political subdivision of the State of Oregon, and 341.47 ACRES OF LAND, more or less, situate in Gilliam, Morrow, Sherman and Umatilla Counties, State of Oregon, DEFENDANTS

COMPLAINT IN CONDEMNATION AND DEMAND FOR JURY TRIAL—Filed August 13, 1963

[fol. 2] 1. This is an action of a civil nature brought by the United States of America at the request of the

Secretary of the Army for the taking of property under power of eminent domain and for ascertainment and award of just compensation to the owners and parties in interest.

2. The authority for the taking is:

Act of February 26, 1931 (46 Stat. 1421, 40 U.S.C., 258a); and acts supplementary thereto and amendatory thereof;
Act of April 24, 1888 (25 Stat. 94, 33 U.S.C. 591);
Act of March 1, 1917 (39 Stat. 948, 33 U.S.C. 701);
Act of May 17, 1950 (Public Law 516, 81st Congress);
Act of October 24, 1962 (Public Law 87-880);

3. The public use for which said property is taken is to provide for the construction of a project for the improvement of navigation, for flood control and for other uses incident thereto in connection with the establishment of John Day Lock and Dam Project and for such other uses as may be authorized by Congress or by Executive Order.

4. The estate taken for said public use is the fee simple title, subject, however, to existing easements for public roads and highways, public utilities, railroads and pipe lines.

5. The property so to be taken is located in Gilliam, Morrow, Sherman and Umatilla Counties, State of Oregon, and more particularly described in Exhibit "A" annexed hereto and by this reference made a part hereof.

6. The persons having or claiming an interest in the property whose names have been ascertained by a reasonably diligent search of the record are listed in Exhibit "B" annexed hereto.

7. Gilliam, Morrow, Sherman and Umatilla Counties, municipal corporations, may have or claim an interest in the property by reason of taxes and assessments due and exigible.

8. On the 13th dau of August, 1963, plaintiff caused to be filed in this Court in this cause a Declaration of Taking of the estate set out herein in the land described in Exhibit "A" annexed hereto, and simultaneously there-

with there was deposited in the Registry of this Court the sum of $15,665.00 as estimated just compensation to [fol. 3] be paid for the taking of said estate in said land.

WHEREFORE, plaintiff demands judgment that said property and estate be condemned and that just compensation for the taking be ascertained and awarded and for such other relief as may be lawful and proper.

DATED at Portland, Oregon, this 13th day of August, 1963.

UNITED STATES OF AMERICA

SIDNEY I. LEZAK
Acting United States Attorney

/s/ Joseph E. Buley
Assistant United States Attorney
Attorneys for Plaintiff

Trial by jury of the issue of just compensation is demanded by Plaintiff.

/s/ Joseph E. Buley
Assistant United States Attorney

[fol. 4] EXHIBIT "A" TO COMPLAINT

TRACT 1617-1

All that portion of the northeast quarter of the southeast quarter of Section 4, Township 2 North, Range 18 East of the Willamette Meridian, Gilliam County, State of Oregon, which lies northeasterly of the center of the main channel of the John Day River.

The tract of land above described contains 10.16 acres, more or less, of which 4.18 acres lie below the ordinary high water line and within the John Day River.

TRACT 1617-2

All that portion of the southeast quarter of Section 4, Township 2 North, Range 18 East of the Willamette Meridian, Sherman County, State of Oregon, which lies southwesterly of the center of the main channel of the John Day River and northeasterly of a traverse line described as follows:

> Beginning at a point lying northerly of the east-west center line of said Section 4, which point lies North 66° 18′ 56″ West, a distance of 2316.32 feet from the quarter section corner lying on the east line of said Section 4; thence South 30° 29′ 36″ East, a distance of 3133.38 feet; thence South 51° 32′ 31″ East, a distance of 1200.00 feet to a point lying easterly of the east line of said Section 4, which point lies North 53° 00′ 31″ East, a distance of 322.34 feet from the southeast corner of said Section 4, and said point being the point of terminus of the above described traverse line.

The tract of land above described contains 41.60 acres, more or less, of which 6.89 acres lie below the ordinary high water line and within the John Day River.

TRACT 2164

All that portion of the West half of the East half of Section 28, Township 3 North, Range 21 East of the

Willamette Meridian, Gilliam County, Oregon, being more particularly described as follows:

Beginning at a point on the south line of the southwest quarter of the northeast quarter of said Section 28, said point being 2,129 feet West of the quarter corner between Sections 27 and 28;

thence South 48° 15′ East, a distance of 351.12 feet;

thence North 39° 45′ East, a distance of 620.40 feet;

thence North 48° 15′ West, a distance of 351.12 feet;

thence South 39° 45′ West, a distance of 620.40 feet, to the point of beginning.

There is excepted therefrom all that portion lying northeasterly of the southwesterly right of way line of the existing John Day Highway.

There is also excepted all that portion lying within the existing right of way of the Oregon-Washington Railroad and Navigation Company, Condon Branch Line.

The tract of land above described contains 1.00 acres, more or less.

[fol. 5] TRACT 2165-1

All that portion of the southwest quarter of the northeast quarter of Section 28, Township 3 North, Range 21 East of the Willamette Meridian, Gilliam County, Oregon, being more particularly described as follows:

Beginning at a point on the south line of said southwest quarter of the northeast quarter, said point being 2,129 feet West of the quarter corner between Sections 27 and 28;

thence North 32° 00′ East to the southwesterly right of way line of the John Day Highway;

thence southeasterly along said highway right of way, to a point on a line bearing North 39° 45′ East from the point of beginning;

thence South 39° 45′ West to the point of beginning.

There is excepted therefrom all that portion lying within the existing right of way of the Oregon-Washington Railroad and Navigation Company, Condon Branch line.

The tract of land above described contains 0.05 of an acre, more or less.

TRACT 2165-2

All that portion of the northwest quarter of the southwest quarter of Section 28, Township 3 North, Range 21 East of the Willamette Meridian, Gilliam County Oregon, being more particularly described as follows:

Commencing at a point on the North line of said northwest quarter of the southeast quarter, said point being West 2,129 feet from the quarter corner common to Sections 27 and 28;

thence South 48° 15′ East, a distance of 351.12 feet;

thence North 39° 45′ East to the northerly right of way line of the Oregon-Washington Railroad and Navigation Company (Condon Branch) and the TRUE POINT OF BEGINNING:

thence continuing North 39° 45′ East to the southerly right of way line of the John Day Highway;

thence southeasterly along said highway right of way to the point of intersection of the northerly right of way line of the Oregon-Washington Railroad and Navigation Company (Condon Branch);

thence northwesterly along said northerly railroad right of way line to the point of beginning.

The tract of land above described contains 0.14 of an acre, more or less.

TRACT 2403

Government Lots 1, 2, 3 and 4 in Section 13, Township 4 North, Range 23 East of the Willamette Meridian, Morrow County, Oregon.

There is excepted therefrom all that portion lying within the existing operating right of way of the Oregon-Washington Railroad and Navigation Company.

The tract of land above described contains 121.00 acres, more or less.

[fol. 6]

TRACT 2514

All that portion of Government Lots 1, 2, 3 and 4, of Section 10, which lies north of a line lying parallel and northerly, a distance of 100 feet from the existing center line of the main line track of the railroad for the Oregon-Washington Railroad and Navigation Company as the same is located and constructed over and across said subdivisions, also all of Government Lots 1, 2, 3 and 4 of Section 9 and all of Government Lots 1 and 2 of Section 8, all in Township 4 North, Range 24 East of the Willamette Meridian, Morrow County, Oregon.

There is excepted from the above described tract of land all that portion lying within the existing railroad right of way of said Section 9 for the said Oregon-Washington Railroad and Navigation Company.

The tract of land above described contains 122.00 acres, more or less.

TRACT 2528

A strip of land 200 feet in width, being 100 feet wide on each side of the center line of the existing main track of the Oregon-Washington Railroad and Navigation Company as the same is located and constructed over and across Government Lots 1, 2, 3 and 4 of Section 10, Township 4 North, Range 24 East of the Willamette Meridian, Morrow County, Oregon, containing 25.20 acres, more or less.

TRACT 3300

All that portion of the west 542 feet of the south half of the southwest quarter of Section 14, Township 5 North,

Range 27 East of the Willamette Meridian, Umatilla County, Oregon, lying northerly of the northerly right of way line of the Oregon-Washington Railroad and Navigation Company containing 8.26 acres, more or less.

TRACT 3305

All that portion of the east 400 feet of Government Lot 2, Section 14, Township 5 North, Range 27 East of the Willamette Meridian, Umatilla County, Oregon, lying northerly of a line described as follows:

Beginning at a point on the east line of said Section 14, said point lying north, a distance of 1700 feet from the southeast corner thereof;

thence South 80° 05′ West to a point on the south line of said Lot 2 and point of terminus of the above described line.

The tract of land above described contains 5.04 acres, more or less.

NOTE: All bearings are referred to the Oregon Coordinate System, North Zone, unless otherwise specified.

[fol. 7] TRACT 3313

The east 359.23 feet of the west 718.46 feet of Government Lot 4 in Section 13, Township 5 North, Range 27 East of the Willamette Meridian, Umatilla County, Oregon, lying northerly of the following described line:

Beginning at a point on the west line of said Section 13, said point lying north a distance of 1700 feet from the southwest corner thereof;

thence North 80° 05′ East, a distance of 800 feet to the point of terminus of the above described line.

The tract of land above described contains 7.02 acres, more or less.

NOTE: All bearings are referred to the Oregon Coordinate System, North Zone, unless otherwise specified.

[fol. 8] EXHIBIT "B" TO COMPLAINT

TRACT NO. 1617-1
TRACT NO. 1617-2

Estimated just compensation—$2,900.00

James Fox) husband and
Emma Fox) wife

George L. Fox) husband and
Lucile H. Fox) wife

TRACT NO. 2164

Estimated just compensation—$1,100.00

A. H. Harding) husband and
Esther E. Harding) wife

H. G. Gosney, doing business as Umatilla Sand & Gravel Company

TRACT NO. 2165-1
TRACT NO. 2165-2

Estimated just compensation—$100.00

George Shane, Jr.

TRACT NO. 2403
TRACT NO. 2514

Estimated just compensation—$7,800.00

R. B. Rands) husband and
Josephine Rands) wife

Ferdinand Emberger) husband and
Jane Doe Emberger) wife

Royal H. Rands) husband and
Louise Rands) wife

West Extension Irrigation District
Northern Pacific Railway Company
State of Oregon

TRACT NO. 2528

Estimated just compensation—$180.00

Fannie Slevin

Ferdinand Emberger) husband and
Jane Doe Emberger) wife

TRACT NO. 3300

Estimated just compensation—$125.00

Clyde Hoyt) husband and
Nellie Hoyt) wife

James F. McMillin) husband and
Madeline McMillin) wife

West Extension Irrigation District

[fol. 9]

TRACT NO. 3305

Estimated just compensation—$160.00

Clyde Hoyt) husband and
Nellie Hoyt) wife

Robert Hoyt) husband and
Thula Hoyt) wife

West Extension Irrigation District

TRACT NO. 3313

Estimated just compensation—$3,300.00

Marvin Simmons) husband and
Norma J. Simmons) wife

Northern Pacific Railway Company

West Extension Irrigation District

[fol. 10]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 63-380

[File Endorsement Omitted]

UNITED STATES OF AMERICA, PLAINTIFF

v.

341.47 ACRES OF LAND, MORE OR LESS, SITUATE IN THE COUNTIES OF GILLIAM, MORROW, SHERMAN, AND UMATILLA, STATE OF OREGON; AND JAMES FOX, ET AL., DEFENDANTS

DECLARATION OF TAKING—Filed August 13, 1963

TO THE HONORABLE,
THE UNITED STATES DISTRICT COURT:

I, Cyrus R. Vance Secretary of the Army of the United States, do hereby declare that:

1. (a) The land hereinafter described is taken under and in accordance with the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U.S.C. 258a), and acts supplementary thereto and amendatory thereof, and under the further authority of the Act of Congress approved April 24, 1888 (25 Stat. 94, 33 U.S.C. 591), and the Act of Congress approved March 1, 1917 (39 Stat. 948, 33 U.S.C. 701), which acts authorize the acquisition of land for river and harbor and flood control purposes; the Act of Congress approved May 17, 1950 (Public Law 516, 81st Congress), which Act authorizes the construction of John Day Lock and Dam; and the Act of Congress approved October 24, 1962 (Public Law 87-880), which act appropriated funds for such purposes.

[fol. 11] (b) The public uses for which said land is taken are as follows: The said land is necessary adequately to provide for the construction of a project for

the improvement of navigation, for flood control and for other uses incident thereto. The said land has been selected by me for acquisition by the United States for use in connection with establishment of John Day Lock and Dam and for such other uses as may be authorized by Congress or by Executive Order.

2. A general description of the land being taken is set forth in Schedule "A" attached hereto and made a part hereof, and is a description of the same land described in the complaint in the above entitled cause.

3. The estate taken for said public uses is the fee simple title, subject, however, to existing easements for public roads and highways, public utilities, railroads and pipe lines.

4. Plans showing the land taken are annexed hereto as Schedule "B" and made a part hereof.

5. The sum estimated by me as just compensation for said land, with all buildings and improvements thereon and all appurtenances thereto and including any and all interests hereby taken in said land, is set forth in Schedule "A" herein, which sum I cause to be deposited herewith in the registry of the said court for the use and benefit of the persons entitled thereto. I am of the opinion that the ultimate award for said land probably will be within any limits prescribed by law on the price to be paid therefor.

IN WITNESS WHEREOF, the United States of America, by its Secretary of the Army, thereunto authorized, has caused this declaration to be signed in its name by said Cyrus R. Vance Secretary of the Army, this 12th day of July, A. D. 1963, in the City of Washington District of Columbia.

/s/ Cyrus R. Vance
Secretary of the Army

[fol. 12]

SCHEDULE "A" TO DECLARATION OF TAKING

The land which is the subject matter of this declaration of taking aggregates 341.47 acres of land, more or less, situate and being in the Counties of Morrow, Gilliam, Sherman and Umatilla, State of Oregon. A description of the land being taken, together with the names of the purported owners thereof, and a statement of the sum estimated to be just compensation therefor, is as follows:

TRACT 1617-1

All that portion of the northeast quarter of the southeast quarter of Section 4, Township 2 North, Range 18 East of the Willamette Meridian, Gilliam County, State of Oregon, which lies northeasterly of the center of the main channel of the John Day River.

The tract of land above described contains 10.16 acres, more or less, of which 4.18 acres lie below the ordinary high water line and within the John Day River.

Names of Purported Owners: See Tract 1617-2

TRACT 1617-2

All that portion of the southeast quarter of Section 4, Township 2 North, Range 18 East of the Willamette Meridian, Sherman County, State of Oregon, which lies southwesterly of the center of the main channel of the John Day River and northeasterly of a traverse line described as follows:

Beginning at a point lying northerly of the east-west center line of said Section 4, which point lies North 66° 18′ 56″ West, a distance of 2316.32 feet from the quarter section corner lying on the east line of said Section 4; thence South 30° 29′ 36″ East, a distance of 3133.38 feet; thence South 51° 32′ 31″ East, a distance of 1200.00 feet to a point lying easterly of the east line of said Section 4, which point lies North 53° 00′ 31″ East, a distance of 322.34 feet from the southeast corner of said Section 4, and

said point being the point of terminus of the above described traverse line.

The tract of land above described contains 41.60 acres, more or less, of which 6.89 acres lie below the ordinary high water line and within the John Day River.

Names of Purported Owners of Tracts 1617-1 and 1617-2:	1. James Fox, and Emma Fox, his wife 2. George L. Fox and Lucile H. Fox, his wife
Addresses of Purported Owners:	1. Corbett, Oregon 2. Rufus, Oregon
Estimated Just Compensation for Tracts 1617-1 and 1617-2:	TWO THOUSAND NINE HUNDRED AND NO/100-DOLLARS ($2,900.00)

[fol. 13] TRACT 2164

All that portion of the West half of the East half of Section 28, Township 3 North, Range 21 East of the Willamette Meridian, Gilliam County, Oregon, being more particularly described as follows:

Beginning at a point on the south line of the southwest quarter of the northeast quarter of said Section 28, said point being 2,129 feet West of the quarter corner between Sections 27 and 28;

thence South 48° 15′ East, a distance of 351.12 feet;

thence North 39° 45″ East, a distance of 620.40 feet;

thence North 48° 15′ West, a distance of 351.12 feet;

thence South 39° 45′ East, a distance of 620.40 feet, to the point of beginning.

There is excepted therefrom all that portion lying northeasterly of the southwesterly right of way line of the existing John Day Highway.

There is also excepted all that portion lying within the existing right of way of the Oregon-Washington

Railroad and Navigation Company, Condon Branch Line.

The tract of land above described contains 1.00 acres, more or less.

Names of Purported Owners: 1. A. H. Harding and Esther E. Harding, his wife.

Address of Purported Owners: 1. Route 2, Box 259C, Troutdale, Oregon

Estimated Just Compensation: ONE THOUSAND ONE HUNDRED AND NO/100 DOLLARS ($1,100.00)

TRACT 2165-1

All that portion of the southwest quarter of the northeast quarter of Section 28, Township 3 North, Range 21 East of the Willamette Meridian, Gilliam County, Oregon, being more particularly described as follows:

Beginning at a point on the south line of said southwest quarter of the northeast quarter, said point being 2,129 feet west of the quarter corner between Sections 27 and 28;

thence North 32° 00′ East to the southwesterly right of way line of the John Day Highway;

thence southeasterly along said highway right of way, to a point on a line bearing North 39° 45′ East from the point of beginning;

[fol. 14] thence South 39° 45′ West to the point of beginning.

There is excepted therefrom all that portion lying within the existing right of way of the Oregon-Washington Railroad and Navigation Company, Condon Branch line.

The tract of land above described contains 0.05 of an acre, more or less.

Names of Purported Owners: See Tract 2165-2

TRACT 2165-2

All that portion of the northwest quarter of the southwest quarter of Section 28, Township 3 North, Range 21

East of the Willamette Meridian, Gilliam County, Oregon, being more particularly described as follows:

Commencing at a point on the North line of said northwest quarter of the southeast quarter, said point being West 2,129 feet from the quarter corner common to Sections 27 and 28;

thence South 48° 15′ East, a distance of 351.12 feet;

thence North 39° 45′ East to the northerly right of way line of the Oregon-Washington Railroad and Navigation Company (Condon Branch) and the TRUE POINT OF BEGINNING:

thence continuing North 39° 45′ East to the southerly right of way line of the John Day Highway;

thence southeasterly along said highway right of way to the point of intersection of the northerly right of way line of the Oregon-Washington Railroad and Navigation Company (Condon Branch);

thence northwesterly along said northerly railroad right of way line to the point of beginning.

The tract of land above described contains 0.14 of an acre, more or less.

Name of Purported Owner of Tracts 2165-1 and 2165-2:	**George Shane, Jr.**
Address of Purported Owner:	**Arlington, Oregon**
Estimated Just Compensation for Tracts 2165-1 and 2165-2:	**ONE HUNDRED AND NO/100 DOLLARS ($100.00)**

TRACT 2403

Government Lots 1, 2, 3 and 4, in Section 13, Township 4 North, Range 23 East of the Willamette Meridian, Morrow County, Oregon.

There is excepted therefrom all that portion lying within the existing operating right of way of the Oregon-Washington Railroad and Navigation Company.

The tract of land above described contains 121.00 acres, more or less.

Names of Purported Owners: **See Tract 2514**

[fol. 15] TRACT 2514

All that portion of Government Lots 1, 2, 3 and 4, of Section 10, which lies north of a line lying parallel and northerly, a distance of 100 feet from the existing center line of the main line track of the railroad for the Oregon-Washington Railroad and Navigation Company as the same is located and constructed over and across said subdivisions, also all of Government Lots 1, 2, 3 and 4 of Section 9 and all of Government Lots 1 and 2 of Section 8, all in Township 4 North, Range 24 East of the Willamette Meridian, Morrow County, Oregon.

There is excepted from the above described tract of land all that portion lying within the existing railroad right of way of said Section 9 for the said Oregon-Washington Railroad and Navigation Company.

The tract of land above described contains 122.00 acres, more or less.

Names of Purported Owners of Tracts 2403 and 2514:	1. R. B. Rands, and Josephine Rands, his wife 2. Ferdinand Emberger 3. Northern Pacific Railway Company 4. State of Oregon
Addresses of Purported Owners:	1. Boardman, Oregon 2. Unknown 3. 1008 Smith Tower, Seattle 4, Washington 4. State Capitol Bldg. Salem, 10, Oregon
Estimated Just Compensation for Tracts 2403 and 2514:	SEVEN THOUSAND EIGHT HUNDRED AND NO/100 DOLLARS ($7,800.00)

TRACT 2528

A strip of land 200 feet in width, being 100 feet wide on each side of the center lime of the existing main track of the Oregon-Washington Railroad and Navigation Company as the same is located and constructed over and across Government Lots 1, 2, 3 and 4 of Section 10, Township 4 North, Range 24 East of the Willamette Meridian, Morrow County, Oregon, containing 25.20 acres, more or less.

Names of Purported Owners:	1. Fannie Slevin 2. Ferdinand Emberger
Addresses of Purported Owners:	1. #6 Ashfield Park Teremure, Dublin 6, Ireland 2. Unknown
Estimated Just Compensation:	ONE HUNDRED EIGHTY AND NO/100 DOLLARS, ($180.00)

TRACT 3300

All that portion of the west 542 feet of the south half of the southwest quarter of Section 14, Township 5 North, Range 27 East of the Willamette Meridian, Umatilla County, Oregon, lying northerly of the northerly right of way line of the Oregon-Washington Railroad and Navigation Company containing 8.26 acres, more or less.

[fol. 16]

Names of Purported Owners:	1. Clyde Hoyt and Nellie Hoyt as tenants in common 2. James F. McMillin and Madeline McMillin, his wife, contract purchasers
Addresses of Purported Owners:	1. Route 2, Box 81, Umatilla, Ore 2. Route 2, Umatilla, Ore
Estimated Just Compensation:	ONE HUNDRED TWENTY FIVE AND NO/100 DOLLARS ($125.00).

TRACT 3305

All that portion of the east 400 feet of Government Lot 2, Section 14, Township 5 North, Range 27 East of the Willamette Meridian, Umatilla County, Oregon, lying northerly of a line described as follows:

Beginning at a point on the east line of said Section 14, said point lying north, a distance of 1700 feet from the southeast corner thereof;

thence South 80° 05′ West to a point on the south line of said Lot 2 and point of terminus of the above described line.

The tract of land above described contains 5.04 acres, more or less.

NOTE: All bearings are referred to the Oregon Coordinate System, North Zone, unless otherwise specified.

Names of Purported Owners:	1. Clyde Hoyt and Nellie Hoyt, tenants in common 2. Robert Hoyt and Thula Hoyt, husband and wife, contract purchasers
Addresses of Purported Owners:	1. Rte 2, Umatilla, Oregon 2. Baxter Road, Hermiston, Oregon
Estimated Just Compensation:	ONE HUNDRED SIXTY AND NO/100 DOLLARS ($160.00)

TRACT 3313

The east 359.23 feet of the west 718.46 feet of Government Lot 4 in Section 13, Township 5 North, Range 27 East of the Willamette Meridian, Umatilla County, Oregon, lying northerly of the following described line:

Beginning at a point on the west line of said Section 13, said point lying north a distance of 1700 feet from the southwest corner thereof;

thence North 80° 05′ East, a distance of 800 feet to the point of terminus of the above described line.

The tract of land above described contains 7.02 acres, more or less.

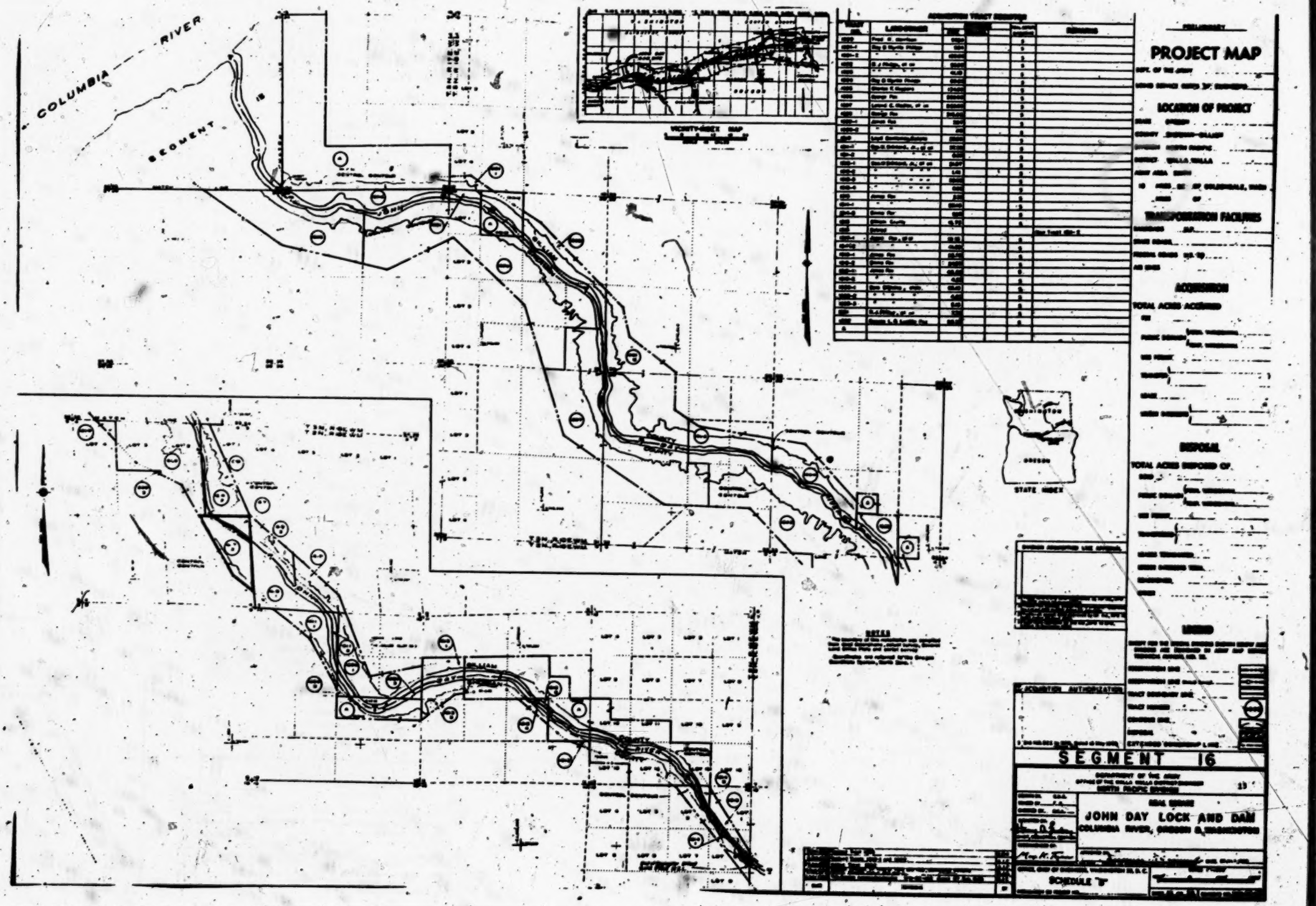
NOTE: All bearings are referred to the Oregon Coordinate System, North Zone, unless otherwise specified.

[fol. 17]

Names of Purported Owners:	1. Marvin Simmons and Norma J. Simmons, his wife 2. Northern Pacific Railway Company
Addresses of Purported Owners:	1. Umatilla, Oregon 2. 1008 Smith Tower, Seattle Washington
Estimated Just Compensation:	THREE THOUSAND THREE HUNDRED AND NO/100 DOLLARS ($3,300.00).

The gross sum estimated to be just compensation for the land hereby taken is FIFTEEN THOUSAND SIX HUNDRED SIXTY FIVE AND NO/100 DOLLARS ($15,665.00).

[fol. 18]

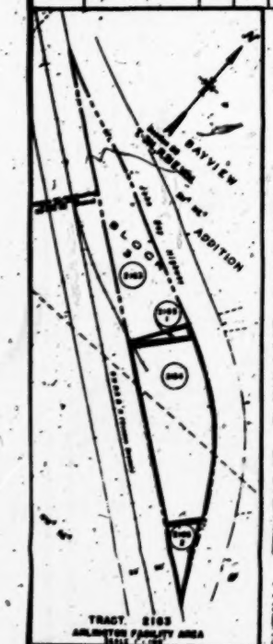

COLUMBIA RIVER
SEGMENT 16
PROJECT MAP
LOCATION OF PROJECT
TRANSPORTATION FACILITIES
ACQUISITION
DISPOSAL
REMARKS
STATE INDEX
SEGMENT 16
JOHN DAY LOCK AND DAM
COLUMBIA RIVER, OREGON & WASHINGTON
SCHEDULE 'B'

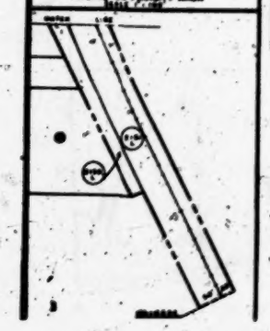
[fol. 19]

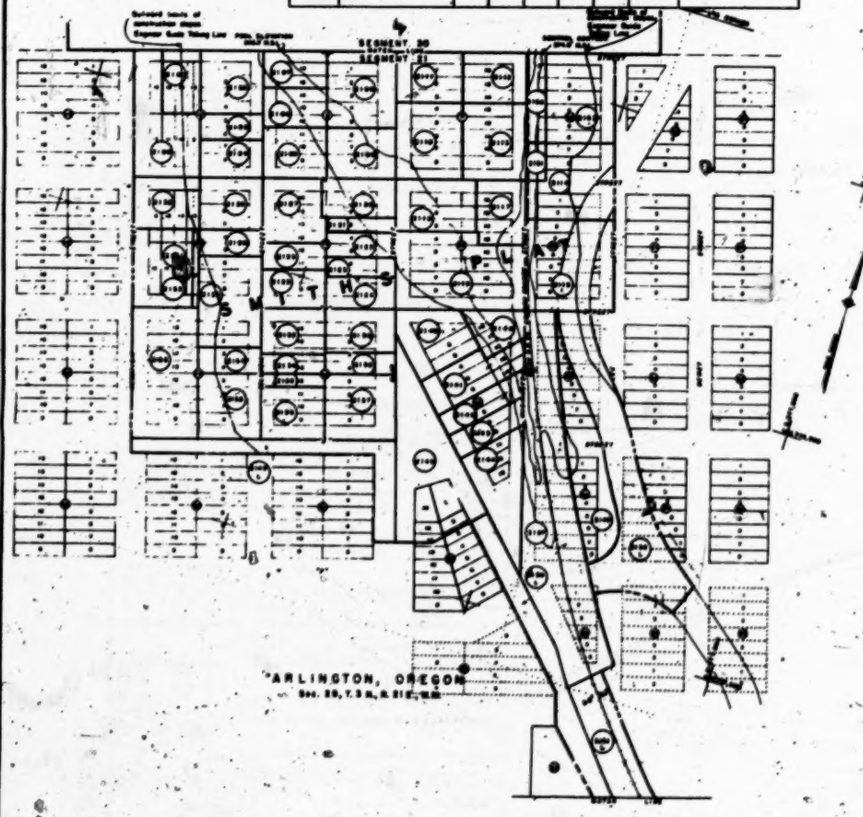
ACQUISITION TRACT REGISTER

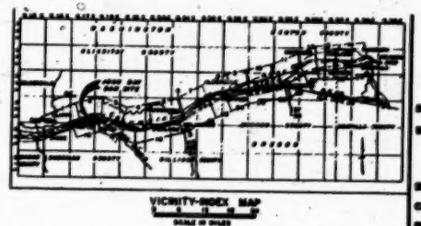
TRACT NO.	LAND OWNER	ACREAGE FEE	ACREAGE EASEMENT	REAL ESTATE AGENT	REMARKS
2100	Burton Shellenberger	0.55			
2101	O.S. Stewart	0.01			
2102	Ethel Davidson	0.04			
2103	Joseph H. Utz	0.10			
2104	Kenneth and Elizabeth Wilson	0.01			
2105	Robert S. Gish	0.09			
2106	Louis A. Hoffstadt	0.01			
2107	Andrew Davidson et ux	0.01			
2108	Golden Water Co.	0.40			
2109	Pacific Tel. and Tel. Co.	0.31			
2110	Methodist Church	0.31			
2111	Trimble Oil Co.	0.46			
2112	John Van Winkle	0.20			
2113	The Texas Co.	0.42			
2114	[illegible]	0.03			
2115	Gilliam County	0.79			Combined With Tract 2041
2116	DELETED			Combined With Tract 2041	
2117	Orpha O. Gibson	0.06			
2118	Henry H. Grohs	0.37			
2119	A.S. Waugh	0.04			
2120	Kenneth and Elizabeth Wilson	0.05			
2121	Golden Water Co.	0.10			
2122	A.F. and A.G. Co. 00	0.10			
2123	Pioneer Orange Grove	0.10			
2124	Laura C. Gish	0.09			
2125	[illegible]	0.01			
2126	Ora E. Hunt	0.10			
2127	Robert E. Gordon	0.34			

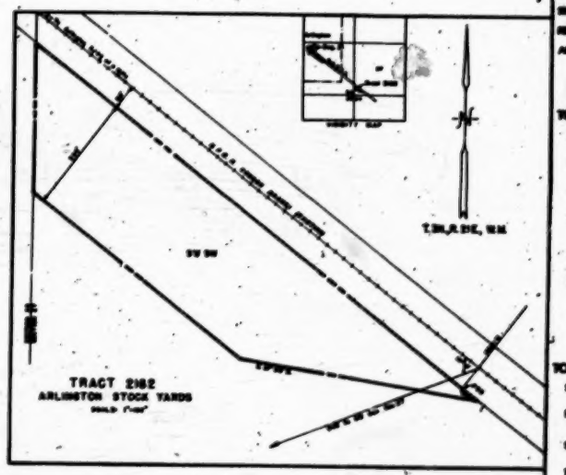
TRACT NO.	LAND OWNER	FEE	ACREAGE EASEMENT	REAL ESTATE AGENT	REMARKS
2128	S.L. Hargraves	0.29			
2129	Willard T. Ellis	0.14			
2130	[illegible]	0.46			
2131	[illegible]	0.06			
2132	Marion Elv Smith	0.30			
2133	John W. Roberts	0.24			
2134	W.J. Fyrup	0.11			
2135	Kenneth and Elizabeth Wilson	0.07			
2136	Foster A. Gass	0.20			
2137	S.L. Lemon	0.60			
2138	William Marshall	0.12			
2139	Alvin A. Weir	0.36			
2140	Lillian Hartigan	0.20			
2141	Methodist Church	0.31			
2142	Elmer L. Bailey	0.20			
2143	Goldie B. Fleischauer	0.10			
2144	George Eldred jr.	0.42			
2145	DELETED				
2146	Lewis E. Gibson	0.19			
2147	Tidewater Oil Co.	0.44			
2148	Leslie E. Gaunt	0.20			
2149L	City of Arlington		No Area		
2150L	[illegible]		No Area		
2151	O.W.R.R. Co.	0.07			
2152	[illegible]	0.04			
2153	Goldie B. Gibbons	0.54			
2154	William A. Bell	0.26			
2155	Harry Brewer	0.27			
2156	Ella G. Gaunt	0.70			
2157	O.W.R.R. Co.	1.50			
2158L	State of Oregon		No Area		
2159	DELETED				Combined With Tract 2147
2160	DELETED				
2161L	O.W.R.R. Co.		No Area		
2162	Arlington Saddle Club Inc.	4.27			
2163	Lillie Tatum	0.04			
2164	A.A. Hardies	1.00			
2165-1	Gertie Stone A.	0.20			
2165-2	" "	0.14			
2166	Goldie B. Gibbons	0.26			











NOTES

PROJECT MAP

LOCATION OF PROJECT

TRANSPORTATION FACILITIES

ACQUISITION

TOTAL ACRES ACQUIRED

DISPOSAL

TOTAL ACRES DISPOSED OF

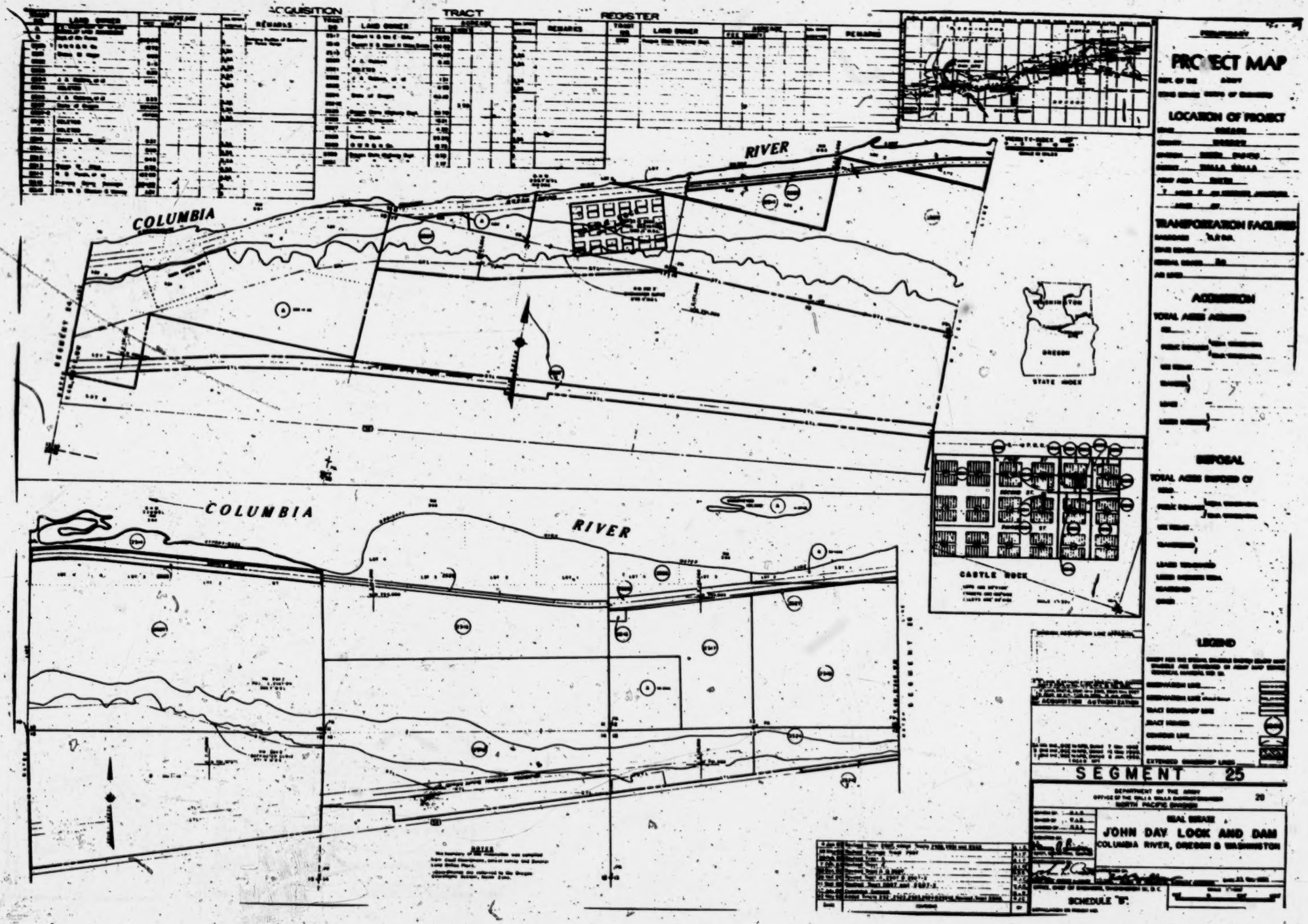
LEGEND

SEGMENT 21

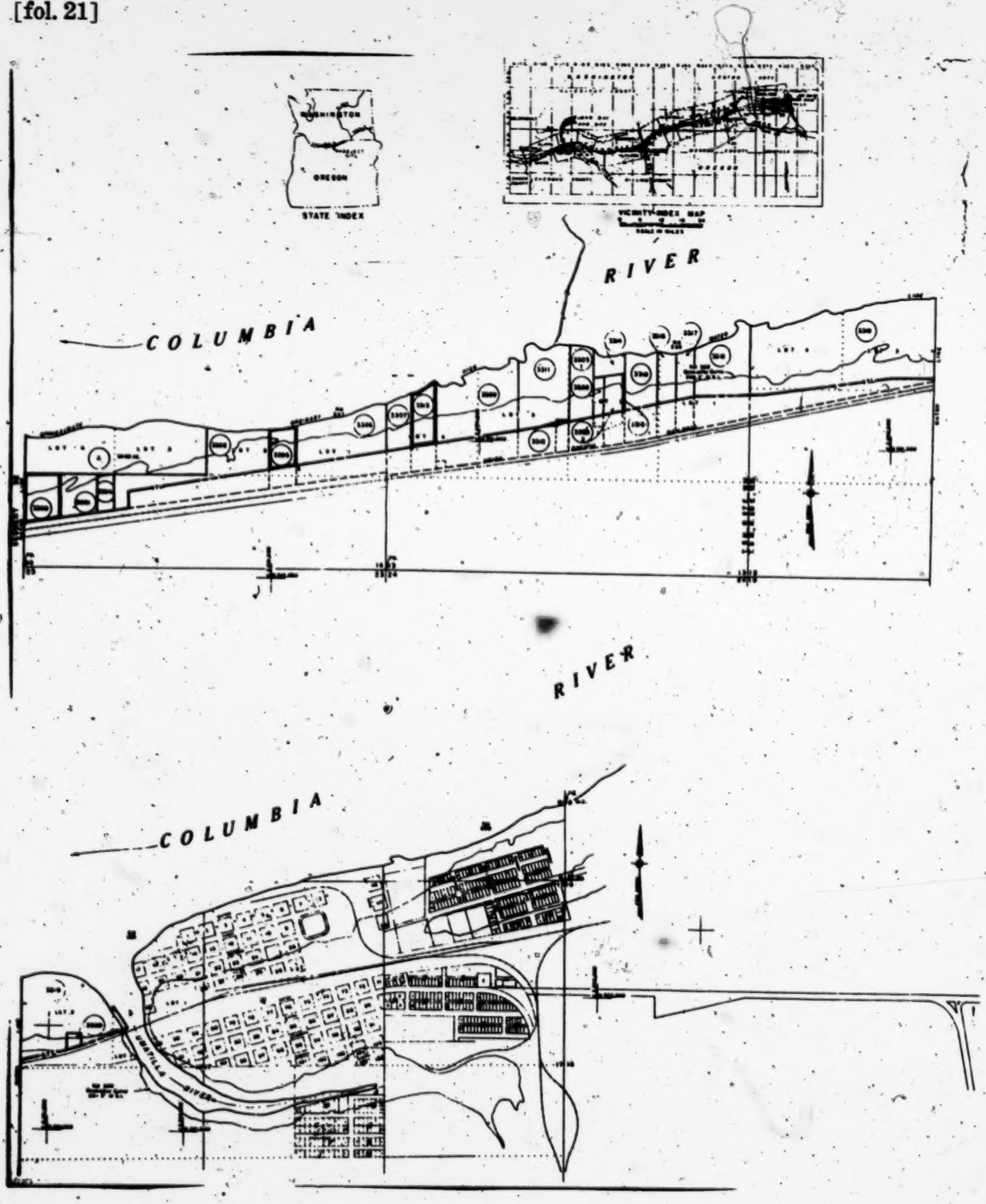
REAL ESTATE

JOHN DAY LOCK AND DAM
COLUMBIA RIVER, OREGON & WASHINGTON
CITY OF ARLINGTON

SCHEDULE "B"


ACQUISITION
TRACT
REGISTER
LAND OWNER
REMARKS
PROJECT MAP
LOCATION OF PROJECT
TRANSPORTATION FACILITIES
ACQUISITION
DISPOSAL
LEGEND
COLUMBIA
RIVER
COLUMBIA
RIVER
OREGON
STATE INDEX
CASTLE ROCK
SEGMENT 25
REAL ESTATE
JOHN DAY LOCK AND DAM
COLUMBIA RIVER, OREGON & WASHINGTON
SCHEDULE "B"

[fol. 21]



ACQUISITION TRACT REGISTER

TRACT NO.	LAND OWNER	ACREAGE	REMARKS
3340		0.39	
3341		7.27	
3342		10.42	
3342-1		0.84	
3342-2		3.47	
3343		3.84	
3344		5.84	
3345		43.80	
3347		3.87	
3348		1.80	
3350		27.10	
3351		0.10	
3311		10.34	
3312		0.20	
3313		7.00	
3314		0.04	
3315		0.01	
3316		4.00	
3317		0.40	
3318		1.40	
3319		10.10	
3320		1.00	

PRELIMINARY

PROJECT MAP

DEPT. OF THE ARMY

CORPS OF ENGINEERS

LOCATION OF PROJECT

STATE OREGON

COUNTY UMATILLA

DIVISION NORTH PACIFIC

DISTRICT WALLA WALLA

ARMY AREA (WITH)

3 MILES SW OF UMATILLA

CITY OF UMATILLA

TRANSPORTATION FACILITIES

RAILROADS N.P.

STATE ROADS

FEDERAL ROADS T30

AIR BASE

ACQUISITION

TOTAL ACRES ACQUIRED

FEE

PUBLIC DOMAIN (FEDERAL WITHDRAWAL, STATE WITHDRAWAL)

USE PERMIT

TRANSFER

OTHER

OTHER WITHDRAWALS

DISPOSAL

TOTAL ACRES DISPOSED OF

SALE

PUBLIC DOMAIN (FEDERAL WITHDRAWAL, STATE WITHDRAWAL)

USE PERMIT

TRANSFERRED

OTHER TRANSFERS

OTHER WITHDRAWALS TOTAL

EASEMENTS

OTHER

LEGEND

EXCEPT FOR THE SPECIAL CONDITIONS SHOWN HEREON AND DESCRIBED IN ARMY MAP SERIES TECHNICAL REPORT NO. 33,

RESERVATION LINE

RESERVATION LINE (MAP LINE)

TRACT DESIGNATION LINE

TRACT NUMBER

CONDEMN LINE

DISPOSAL

EXTENDED OWNERSHIP LINE

SEGMENT 33

DEPARTMENT OF THE ARMY
OFFICE OF THE WALLA WALLA DISTRICT ENGINEER
NORTH PACIFIC DIVISION

21

REAL ESTATE

JOHN DAY LOCK AND DAM
COLUMBIA RIVER, OREGON & WASHINGTON

SCHEDULE "B"

[fol. 22]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 63-380

[File Endorsement Omitted]

UNITED STATES OF AMERICA, PLAINTIFF

vs.

JAMES FOX and EMMA FOX, husband and wife; GEORGE L. FOX and LUCILE H. FOX, husband and wife; A. H. HARDING and ESTHER E. HARDING, husband and wife; H. G. GOSNEY, doing business as Umatilla Sand and Gravel Company; GEORGE SHANE, JR., a single man; R. B. RANDS and JOSEPHINE RANDS, husband and wife; FERDINAND EMBERGER and JANE DOE EMBERGER, husband and wife; ROYAL H. RANDS and LOUISE RANDS, husband and wife; WEST EXTENSION IRRIGATION DISTRICT; NORTHERN PACIFIC RAILWAY COMPANY; FANNIE SLEVIN, a single woman; CLYDE HOYT and NELLIE HOYT, husband and wife; JAMES F. MCMILLIN and MADELINE MCMILLIN, husband and wife; ROBERT HOYT and THULA HOYT, husband and wife; MARVIN SIMMONS, and NORMA J. SIMMONS, husband and wife; STATE OF OREGON; GILLIAM COUNTY, MORROW COUNTY, SHERMAN COUNTY, AND UMATILLA COUNTY, municipal corporations and political subdivision of the State of Oregon, and 341.47 ACRES OF LAND, more or less, situate in Gilliam, Morrow, Sherman and Umatilla Counties, State of Oregon, DEFENDANTS

JUDGMENT ON THE DECLARATION OF TAKING AND ORDER OF IMMEDIATE POSSESSION—August 14, 1963

[fol. 23] This cause coming before the Court on motion of plaintiff, and the Court having considered the record and the representations made in this case and being fully advised, FINDS; that these proceedings have been con-

ducted according to law and that this Court has jurisdiction of the parties and the subject matter of this case.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the fee simple title, subject, however, to existing easements for public roads and highways, public utilities, railroads and pipe lines, in and to the land more particularly described in Exhibit "A" annexed hereto, became vested in plaintiff on the 13th day of August, 1963, the date of the filing of the Declaration of Taking and of payment into Court of the estimated just compensation, and that on said date the right to receive just compensation vested in the persons entitled thereto.

IT IS FURTHER ORDERED that possession of Tracts Nos. 2164, 2165-1, 2165-2, 2403, 2514 and 2528 is awarded to plaintiff as of the 14th day of August, 1963.

IT IS FURTHER ORDERED that possession of Tracts Nos. 1617-1, 1617-2, 3300, 3305 and 3313 is awarded to plaintiff as of January 1, 1964.

ENTERED this 14th day of August, 1963.

/s/ William G. East
Judge

PRESENTED BY:

/s/ Joseph E. Buley
JOSEPH E. BULEY
Assistant United States Attorney

[fol. 24]

[CLERK'S NOTE: Exhibit "A"—Description of Tracts of land is omitted from the record here as it appears on pages 4-7 supra.]

[fol. 28]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 63-380

[File Endorsement Omitted]

[Title Omitted]

NOTICE OF APPEARANCE—Filed September 3, 1963

[fol. 29] COMES NOW R. B. RANDS and JOSEPHINE RANDS, husband and wife, by their attorneys, Mahoney & Abrams, and state that they claim an interest as the owners of the property described as Tracts 2403 and 2514 in the complaint filed in the above captioned case, as follows:

TRACT 2403

Government Lots 1, 2, 3 and 4 in Section 13, Township 4 North, Range 23 East of the Willamette Meridian, Morrow County, Oregon.

There is excepted therefrom all that portion lying within the existing operating right of way of the Oregon-Washington Railroad and Navigation Company.

The tract of land above described contains 121.00 acres, more or less.

TRACT 2514

All that portion of Government Lots 1, 2, 3 and 4, of Section 10, which lies north of a line lying parallel and northerly, a distance of 100 feet from the existing center line of the main line track of the railroad for the Oregon-Washington Railroad and Navigation Company as the same is located and constructed over and across said subdivisions, also all of Government Lots 1, 2, 3 and 4 of Section 9 and all

of Government Lots 1 and 2 of Section 8, all in Township 4 North, Range 24 East of the Willamette Meridian, Morrow County, Oregon.

There is excepted from the above described tract of land all that portion lying within the existing railroad right of way of said Section 9 for the said Oregon-Washington Railroad and Navigation Company.

The tract of land above described contains 122.00 acres, more or less.

The interest claimed is in the nature of a full interest in the property above described subject to reservations of record as to the West Extension Irrigation District, Northern Pacific Railway Company and the State of Oregon.

WHEREFORE, defendants demand that they be considered a defendant in the matter and receive notice of all proceedings affecting said property.

MAHONEY & ABRAMS

/s/ By Robert B. Abrams
Mahoney & Abrams
Attorneys at Law
P. O. Box 428
Heppner, Oregon

[fol. 30] DATED August 28, 1963.

Trial by jury of the issue of just compensation is demanded.

MAHONEY & ABRAMS

By /s/ Robert B. Abrams
of Attorneys for R. B. Rands
and Josephine Rands

[fol. 31]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 63-380

[File Endorsement Omitted]

[Title Omitted]

MOTION TO AMEND NOTICE OF APPEARANCE—
Filed September 27, 1963

COME NOW the defendants R. B. Rands and Josephine Rands and move this Honorable Court for its Order permitting them to Amend their Notice of Appearance heretofore filed in this cause by denominating same as an "Answer" and by alleging defenses and objections to the taking of their property.

DATED: This 26th day of September, 1963.

MAHONEY & ABRAMS

By: /s/ Robert B. Abrams alp
DUSENBERY, MARTIN, BEATTY & PARKS

By: /s/ Alex L. Parks
Of Counsel for Defendants

In support of this Motion, defendants rely upon the affidavit attached hereto, FRCP 6(b) and 60(b), and decisions relating thereto.

[fol. 32] ATTACHMENT TO MOTION

STATE OF OREGON)
) ss:
County of Multnomah)

I, Alex L. Parks, being first duly sworn upon oath depose and say:

That defendants herein, after being served with the Notice filed by plaintiff UNITED STATES OF AMERICA pursuant to Rule 71A, sought counsel of Mahoney & Abrams, Heppner, Oregon. Upon investigation it appeared to the said Mahoney & Abrams at that time that no grounds existed for objecting to the taking of defendants' property and they, therefore, filed the usual Notice of Appearance which, under Rule 71A, simply permits the defendants to contest the amount of compensation to be paid.

Subsequent to the filing of the said Notice of Appearance, Mahoney & Abrams contacted your affiant with the request that he assist them as co-counsel. Due to circumstances beyond the control of either your affiant or Mahoney & Abrams, counsel were not able to confer and conduct a joint analysis of the matter until after the 20 days mentioned in Rule 71A had expired.

Until such conference and analysis, it was not apparent to either your affiant or Mahoney & Abrams that probable grounds existed upon which defendants could contest the actual taking by condemnation. To the extent to which time has permitted counsel to explore such possibility, it now appears due to the peculiar circumstances involved (the property is located in the area which the State of Oregon is developing as the so-called "Boardman Space Age Park" for lease to Boeing Aircraft; said property probably will be required to be used for the development of port facilities for said space age park; and your affiant is informed that an agreement has been entered into between the United States and the State of Oregon whereby the United States is or will be required to declare said property "surplus" to its needs for flood control and navigation and thereafter transfer over the same to the State of Oregon) that the plaintiff United States lacks jurisdic-

tion for the taking and that the cognizant agency of the United States responsible for initiating the taking has acted arbitrarily, capriciously and without authority in seeking to condemn said property for the purposes to which it proposes to put the same.

Rule 71A permits only two responses to the Complaint [fol. 33] in Condemnation; i.e., a Notice of Appearance—in which only value can be contested; and an Answer—in which condemnee can assert defenses and objections to the taking. Thus, defendants can only assert its defense that the plaintiff lacks authority to condemn (and its corollary that the court lacks jurisdiction) in a pleading denominated as an "Answer" which expressly sets up such defense. Defendants are thus precluded from litigating the lack of jurisdiction unless they are permitted to amend the Notice of Appearance and assert such defense.

Allowing defendants to amend their Notice of Appearance can not and will prejudice the position of plaintiff United States. The trial of this matter, in normal course of events, will not be held until the Spring of 1964. Defendants were served with the Complaint in Condemnation on August 19th, 1963, and less than 39 days have elapsed since defendants first received notice of the pendency of the suit.

Unless defendants are thus permitted to amend their Notice of Appearance to denominate the same as an "Answer" and thereby assert defenses and objections to the taking, their position will be irreparably prejudiced and the condemnation suit could proceed to judgment without the jurisdictional issue having been decided and litigated in an adversary fashion.

Your affiant, therefore, respectfully asks that defendants be permitted to amend their Notice of Appearance, as aforesaid, upon the grounds of excusable neglect as permitted by FRCP 6(b) and 60(b).

/s/ Alex L. Parks

SUBSCRIBED and sworn to before me this 27th day of September, 1963.

/s/ Carol J. Wirtz
Notary Public for Oregon
My Commission Expires: 7-22-67

[fol. 34] Due service of the within Motion & Affidavit is hereby accepted in Multnomah County, Oregon, this 27th day of September, 1963, by receiving a copy thereof, duly certified to as such by Alex L. Parks, of Attorneys for Defendants Rands.

/s/ Joseph E. Buley
Of Attorneys for Plaintiff
United States of America

[fol. 35]

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

Civil No. 63-380

[File Endorsement Omitted]

UNITED STATES OF AMERICA, PLAINTIFF

v.

. . . R. B. RANDS and JOSEPHINE RANDS, Husband and Wife, . . ., DEFENDANTS

OPINION AND ORDER—October 16, 1963

This is a condemnation proceeding. The cause is before the Court on the motion of the defendants Rands, for permission to file an answer setting up a defense challenging the right of the United States to condemn defendants' property.

The record discloses that defendants were served with complaint in this cause on August 13, 1963. A declaration of taking [1] was filed herein on August 13, 1963. On September 3, 1963, the Rands' filed a petition for an 80% distribution of the amount of just compensation placed

[1] 40 U.S.C. § 258a.

on deposit and on the same day filed a notice of appearance, which did not in any way indicate that a question would later be raised as to the right to condemn.

The motion was not filed within the twenty day period mentioned in Rule 71A (e). The plaintiff relied on the appearance filed by said defendants and, thereafter, and before the filing of the motion, conveyed a portion of the [fol. 36] property, the title to which was acquired by the declaration, to the State of Oregon.

It is my opinion that Rule 71A (e) requiring landowners to present all defenses or objections to the taking within twenty days from the date of service of process, is absolute and that the Court, on that particular feature, has no jurisdiction to extend time in which to raise such defenses.

Significant is the fact that the language of the rule with reference to the service of the notice of appearance is permissive . . . "*he may serve* a notice of appearance . . .", while the language with reference to the service of an answer, in raising a defense, is mandatory, . . . "if a defendant has any objection or defense to the taking of his property, *he shall serve his answer* within twenty days . . .". Manifestly, the Congress by using different terminology must have intended a different result.

The use of the word "shall" in the statute, although not entirely controlling, is of significant importance, and, indicates an intention that the statute should be construed as mandatory. *Escoe* v. *Zerbst*, 295 U.S. 490; *West Wisconsin Railway Co.* v. *Foley*, 94 U.S. 100; *Pittman Construction Co., Inc.* v. *Housing Authority of Opelousas*, 167 F. Supp. 517, affirmed 264 F.2d 695. Recognizing, as I do, that the word "shall" should be construed permissively as meaning "may" where the Congress so intended, *Ballou* v. *Kemp*, 92 F.2d 556, I find nothing in the language before me which would indicate such an intention.

The language employed in connection with requiring a defendant to raise his defense within twenty days, from service, is similar to, if not identical with, the language used in Rule 59(b) with reference to the time limit within which to file a motion for a new trial. ". . . A motion for

[fol. 37] a new trial *shall be served* not later than ten days after the entry of the judgment. . . ." In construing this subdivision of Rule 59, the Courts have uniformly held that the language is mandatory and that a Judge has no power or authority to act after the time has expired. *Hulson, et al,* v. *Atchinson, Topeka and Santa Fe Railway Co.,* 27 F.R.D. 280, 289 F.2d 726 (7 Cir. 1961), cert. den. 368 U.S. 835.

It is my belief that neither Rule 6(b) nor Rule 60(b), apply to this particular problem. Assuming, however, that such rules apply, *United States* v. *1108 acres of land, etc.* 25 F.R.D. 205, I find that the showing made in support of this motion is insufficient to grant defendants relief under such rules. Furthermore, if I have discretion, I would exercise that discretion against the allowance of the motion for the reason that the defendants made no attempt to raise the question until after a substanial portion of the property had been transferred to the State of Oregon.

The language of the rule is clear and concise. The progress of events in this case demonstrates the absolute necessity of adhering to the specific requirement that these defenses be raised within the twenty day period. Otherwise, the Government would be led into believing that no such defenses would be presented and, as often occurs, make some disposition of a part, which it believes to be in excess, to some other Governmental agency.

The motion should be denied.

IT IS SO ORDERED.

DATED this 16th day of October, 1963.

/s/ John F. Kilkenny
District Judge

[fol. 38]

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

Civil No. 63-380

[File Endorsement Omitted]

UNITED STATES OF AMERICA, PLAINTIFF

v.

JAMES FOX, ET AL, DEFENDANTS

MEMORANDUM OPINION—October 12, 1964

Presented for decision in advance of the trial is the very narrow question of whether just compensation, required to be paid by the United States by reason of the Fifth Amendment, includes the value of defendants' land as a port site for future development. Defendants' lands border the high water mark of the Columbia River for a considerable distance, and, for the purposes of this opinion, it is conceded that at least one site could be utilized as a port.

I am unable to distinguish between the value of land as a site for hydroelectric power purposes, the issue before the court in *United States* v. *Twin City Power Co.*, 350 U.S. 222 (1955), and the value of land as a site for port operations. The successful operation of each depends on the flow of the stream. A port without water is no more susceptible to successful operation than would be a hydroelectric plant without its source of power. It is my belief that the value, if any, for port purposes is subject to the overriding navigational services of the United States, [fol. 39] which permits the appropriation of any such a property right by the United States without compensation. *United States* v. *Virginia Electric & Power Co.*, 365 U.S. 624 (1960).

Careful study has been given to the resourceful arguments of the defendants. Although confusion exists in the reasons given for the different United States Supreme

Court cases, and in some respects they cannot be reconciled, I believe the underlying principles announced in the decisions would preclude an award for value that might be attributed to a port site on this great navigational stream.

DATED this 12th day of October, 1964.

/s/ John F. Kilkenny
District Judge

[fol. 40]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 63-380

[File Endorsement Omitted]

UNITED STATES OF AMERICA, PLAINTIFF

vs.

R. B. RANDS and JOSEPHINE RANDS,
husband and wife, DEFENDANTS

PRETRIAL ORDER TRACT No. 2514—April 5, 1965

This case having come on for pretrial before the Honorable John F. Kilkenny, one of the Judges of the above-entitled Court, on the ..... day of ....., 1965, plaintiff appearing by and through Joseph E. Buley, Assistant United States Attorney, and defendants R. B. Rands and Josephine Rands, husband and wife, appearing by and through Alex Parks, of their attorneys, whereupon the parties did confer and agree upon the following, subject to the approval of the Court.

I

STATEMENT OF JURISDICTION NATURE OF PROCEEDINGS

The jurisdiction of the Court is founded on Title 28, Section 135(a), U.S.C. This is a condemnation case filed on behalf of the Corps of Engineers, an agency of the United States of America, to acquire Tract 2514 for the John Day Lock and Dam Project.

II

AGREED FACTS

A Declaration of Taking was filed on August 13, 1963, [fol. 41] and that date is the date of taking. The interest being acquired is the fee simple title, subject, however, to existing easements for public roads and highways, public utilities, railroads and pipe lines. A description of the land taken is set forth in Exhibit "A" attached hereto and hereby made a part hereof. There are 139.00 acres being acquired. The property is owned by R. B. Rands and Josephine Rands, husband and wife.

III

PLAINTIFF'S CONTENTIONS

Plaintiff makes the following contentions:

1. The highest and best use of the property is for agricultural use.
2. Comparable transactions upon which plaintiff relies are listed and attached hereto, marked Exhibit "B".
3. The defendants are entitled to no enhancement of value for a port site use dependent upon riparian location upon the Columbia River which is a navigable stream.
4. The defendants are entitled to no enhancement of value because of the announcement and construction of the John Day Lock and Dam Project.
5. The defendants have no compensable interest in any property located below the normal high water line of the Columbia River.

IV

DEFENDANTS' CONTENTIONS

Defendants make the following contentions:

1. The highest and best use of the property designated as Tract No. 2514 is as follows:

(a) With respect to government lots 1, 2, 3 and 4, Section 10, Township 4 North, Range 24 East, Willamette Meridian, Sand and gravel;

(b) With respect to government lots 1 and 2, Section 8, Township 4 North, Range 24 East, Willamette Meridian, port site;

(c) With respect to the remainder of Tract No. 2514, irrigable and grazing lands.

2. Comparable transactions upon which defendant relies are listed and attached hereto marked Exhibit "C".

[fol. 42] 3. The landowners are entitled to the value of a port site on the property.

4. The government does not have the right to take nor is a public purpose served by the acquisition of the entire site, and defendants should have been allowed to amend their notice of appearance to raise such issues.

V

ISSUE OF FACT

The issue of fact to be decided by the jury is the value of the property.

VI

ISSUES DETERMINED BY THE COURT IN ADVANCE OF TRIAL

The Court has previously ruled that the defendants cannot amend their notice of appearance to question the authority of the government to acquire this property. The Court further held that no sufficient showing was made in any event to deny the government's authority to acquire the property. The defendants are granted an excep-

tion thereto. The defendants desire to make an additional offer of proof in regard thereto.

The Court has previously held that the defendants are entitled to no increment of value because of an alleged port site. The Court granted an exception to its ruling and has agreed that a limited offer of proof in regard thereto may be made.

VII

ISSUE OF LAW

The only issue of law (exclusive of those appearing under paragraph VI) to be determined by the Court is judgment of just compensation based upon the jury verdict.

VIII

EXPERT WITNESSES

1. Plaintiff's expert witnesses are Elmer Kolberg, Leo R. Mayers, S.A. Ross and Larry McDevitt, as to tests of the sand and gravel.

2. Defendants' expert witnesses as to value of sand and gravel, and grazing lands are Harley McDowell, R. J. Deacon and/or Charles R. Lane, and H. G. Gosney; as to value of port site, Captain A. Leppaluoto, and Samuel Mallicoat.

[fol. 43]

IX

EXHIBITS

The following exhibits will be produced and marked and may be received in evidence or otherwise admissable without further identification or authentication. Except as hereafter noted each is what it purports to be:

Plaintiff's Exhibits:

1. An aerial photograph.
2. Map.
3. Vicinity and/or sales map.
4. Reserved for pictures.
5. Reserved.

Defendants' Exhibits:

1. Report on gravel deposit by Northwest Testing Laboratories.
2. Aerial Photographs.
3. Maps showing in detail.
4. Deed, Federal Government to State of Oregon relative to Boardman Project.
5. Maps of gravel bar in prior years, including surveyor's notes.
6. Report of selection of site for the relocation of Boardman, Oregon: Cornell, Howland, Hayes and Merrifield, July, 1962.
7. Relocation of Boardman, Oregon, Bureau of Municipal Research and Service, June, 1962.
8. Reserved for stipulation, re: offer of proof on port site value.
9. Reserved.

X

EXPERT TESTIMONY

The Court has limited each party to three experts to testify as to the value of the property. The landowner is not included for the purpose of contruing this limitation, nor are experts called for limited offers of proof under paragraph VI.

XI

ORDER OF PRESENTATION

The defendant elects to proceed first in the presentation of the case.

[fol. 44]

XII

The foregoing constitutes the pretrial order in the above case; the pleadings shall pass out of the case insofar as the trial of the issue of just compensation is concerned,

and shall not be amended except by consent of the parties, or by order of the Court to prevene manifest injustices.

Dated this 5th day of April, 1965.

/s/ John F. Kilkenny
United States District Judge

The Foregoing Pretrial Order Is Approved:

DATE: March 31, 1965

/s/ Joseph E. Buley
Of Attorneys for Plaintiff

/s/ Alex Parks
Of Attorneys for Defendants

DATE: March 31, 1965

[fol. 45]

EXHIBIT "A" TO PRETRIAL ORDER

JOHN DAY LOCK AND DAM

COLUMBIA RIVER, OREGON AND WASHINGTON

R. B. Rands, et ux

Tract 2514
139.00 Acres

Description of Tract

All that portion of Government Lots 1, 2, 3 and 4, of Section 10, which lies north of a line lying parallel and northerly, a distance of 100 feet from the existing center line of the main line track of the railroad for the Oregon-Washington Railroad and Navigation Company as the same is located and constructed over and across said subdivisions, also all of Government Lots 1, 2, 3 and 4 of Section 9 and all of Government Lots 1 and 2 of Section 8, all in Township 4 North, Range 24 East of the Willamette Meridian, Morrow County, Oregon.

There is excepted from the above described tract of land all that portion lying within the existing railroad right of way of said Section 9 for the said Oregon-Washington Railroad and Navigation Company.

The tract of land above described contains 139.00 acres, more or less.

VHG 8 Jan 1962
Revised: VHG 3 Feb 1962
Revised: NJR 29 Jun 1962
Revised Acreage (Acq.): HAL 6 May 1964

[fol. 46]

Grantor: Paul Slaughter
Grantee: I. R. SULLIVAN
Date: 5/8/63
Recorded: Bk 69, page 186
Price: $1000
Desc NE¼ NE¼ Sec. 8, T 4N R 26E

Grantor: Jess Hansen
Grantee: Krebs Bros.
Date: 5/17/63
Recorded: Bk 44, page 240
Price: $15,000
Desc.: Portions of Section 26 and 35, T 3N R 22E

Grantor: Peter Campbell
Grantee: D. L. Lemon
Date: 4/2/63
Recorded: Volume E, page 227 (Miscellaneous Records)
Price: $36,000
Desc.: Portions of Sections 8, 9, 7, 17, 18, 19, 20 & 29, T 1N R 22E

Grantor: B. P. Doherty
Grantee: Lawrence Lindsay
Date: 12/16/63
Recorded: Misc. Volume 6, page 481
Price: $100,000
Desc.: Portions Section 25 and 36, T 2N R 25E and portions Sec. 1, 2 and 11, T 1N R 25E

Grantor: Mildred Halvorsen
Grantee: John W. Krebs
Date: 1/8/62
Recorded: Bk. 43, page 121
Price: $1600
Descr.: SW¼ Sec. 28, T 3N R 22E

Grantor: Fannie Slevin
Grantee: R. B. Rands
Date: 10/31/61
Price: $2500
Acreage: 52.4 acres, more or less
Desc.: All that portion of Section 10, T 4N R 24E lying north of the O.W.R. & N Co. right of way

[fol. 47]

Grantor: Fannie Slevin
Grantee: Don E. Hurrle
Date 11/15/61
Price: $7000
Acreage: 320 acres, more or less
Desc.: That part of the south half of Section 23, Township 4N R 24E lying south of the right of way of the main canal of the west extension of the Umatilla Project, and containing 315 acres. Also that part of the northwest quarter southeast quarter of Section 23, T 4N R 24E lying north of the canal and containing 5 acres, more or less

[fol. 48]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 63-380

Pendleton, U. S. District Court, District of Oregon,
Filed Apr. 6, 1965, Keith Burns, Clerk,
By /s/ H. Jorgensen, Deputy, offer rejected

[Title Omitted]

STIPULATION RE OFFER OF PROOF—Filed April 6, 1965

The Court having previously ruled in the above entitled cause that defendants are not entitled to any enhancement to the value of a portion of their lands by reason of the use or potential use of the same as a port-site, but that defendants may sumbit a limited offer of proof in regard thereto for the purposes of appeal, it is hereby stipulated, subject to the approval of the Court, that the attached affidavits shall constitute such a limited offer of proof and that if the affiants were called as witnesses their testimony would be substantially as set forth in the said attached affidavits.

DATED: This 6th day of April, 1965.

DUSENBERY, MARTIN, BEATTY & PARKS

By: /s/ Alex L. Parks
Of Counsel for Defendants R. B. and Josephine Rands

SIDNEY LEZAK, United States Attorney

By: /s/ Joseph Buley
Assistant United States Attorney
Counsel for Plaintiff United States of America

[fol. 49]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 63-380

[Title Omitted]

AFFIDAVIT OF CAPT. A. LEPPALUOTO

STATE OF OREGON)
) ss
County of Multnomah)

CAPT. A. LEPPALUOTO, being first duly sworn deposes and says:

I am a licensed master of motor propelled vessels of under 4,000 tons, any ocean, any waters, having acquired such license by reason of experience on the Columbia River and its tributaries.

I first became involved in the water transportation industry when I was 17 years old, working aboard a small tug in Gray Harbor-Aberdeen, Washington.

In 1936, by then the owner of my own tugboat, the MYSTIC, I migrated to the Columbia River area. From 1936 to 1940 I did miscellaneous towing work on the middle and upper Columbia rivers but primarily operated drill barges doing contract work for the Corps of Engineers in making soundings of the Columbia River for navigation and dam purposes. This work was accomplished in the area of Bonneville Dam and between Celilo, Oregon and Umatilla, Oregon.

In the late 1930's the only main-stem dam on the [fol. 50] Columbia River was Bonneville Dam. Navigation above Bonneville Dam at that time had been confined to steamboats carrying small amounts of cargo. In 1938 I was hired by Tidewater Transportation Company to pilot a screw-type tugboat and barge up the Columbia to Umatilla, Oregon, at that time the head of navigation on the Columbia River. This was the first such movement on

the Columbia River. Subsequently, I was also employed to pilot the first tugboat of the Inland Navigation Company to push a petroleum barge as far upriver as Umatilla, Oregon.

By 1940, I had two tug companies of my own and at that time merged with the Inland Navigation Company and its affiliates. From 1940 until 1958 I was an officer, director, stockholder and General Manager of the Inland Navigation companies (numbering nine corporations and one partnership). At the time of my retirement in 1958, these companies owned and operated over 23 tugs and 40 barges, one of the tugs being the highest powered tugboat west of the Mississippi River and one of the barges being the largest barge ever operated on the Pacific Coast. The ICC operating rights of the companies extended from Mexico on the south to Alaska on the North and on the Columbia River from Astoria to Priest Rapids Dam and on the Snake River from its mouth to Hells Canyon, Idaho.

The principal commodities transported by the companies were wheat down the Columbia, petroleum up the Columbia and lumber and lumber products up and down the Pacific Coast. The companies owned or leased and operated terminals and port sites on the Columbia River at The Dalles, Oregon, Umatilla, Oregon, and Pasco, Washington, as well as serviced river grain elevators and terminals at such points as Arlington, Umatilla, The Dalles, Pasco, Rufus, Biggs Junction, etc.

From the inception of major barge transportation on the Columbia in the late 1930's I have had to be, and am, intimately informed about the availability of port sites on the Columbia River. This was absolutely necessary because port sites meant cargo and cargo was the life-blood of my companies. I have been intimately acquainted with the Boardman, Oregon area for almost 30 years, particularly the old port site at Castle Rock, Oregon.

[fol. 51] Historically, the Castle Rock landing was one of the earliest on the Columbia River. Sheep, wool, sacked grain and barrelled petroleum were loaded aboard sternwheelers at the Castle Rock landing before the turn of the century. The principal advantage of the landing then and now is the fact that deep water (at least 15 feet at

mean low water) exists right up against the shore and vessels could then and can now be put in at the landing at all stages of the water.

There is a grave shortage of available port sites on the Columbia River, a factor not generally understood or appreciated except by those who are in the water transportation business. The reason is really two-fold: (1) the Federal government has acquired fee title to practically all the shorelands on both sides of the Columbia River from Bonneville Dam upstream to the head of navigation. This came about because of the numerous dams which the Corps of Engineers has constructed and because the policy of the Corps has been to acquire fee title rather than flowage easements. (2) The river is paralleled within a hundred yards or so by the railroad tracks of the S.P.&S. Railway Company (in Washington) and the Union Pacific Railroad Company (in Oregon). The railroads understandably are jealous of their business and routinely refuse all requests for easements for roadways and pipelines over their tracks to the water's edge, knowing that such easements would make it possible for the water carriers to load and discharge cargo and thus compete with the railroads.

The only port-site acquisition that I know of by private owners on the Columbia River in the last 20 years was a long term (50 years) lease I secured for my companies from the United States near Biggs Junction, Oregon. This took place in 1957 or 1958, I do not now recall which. No drastic need then existed for the port site but I wanted to acquire it for the future because I had first hand knowledge of the difficulty of acquiring port sites which were not already owned by the Federal government and hedged in by railroad tracks.

The port-site at Castle Rock is extremely valuable because of these foregoing factors and because a public road [fol. 52] already crosses the Union Pacific main line track directly to the port site area. Furthermore, without the availability to the water, it is my understanding that the Boeing Company could have no way of moving in large missiles. This could easily be done, of course, by barges whether or not John Day Dam were ever built and completed; i.e., the John Day dam pool is not needed to pro-

vide adequate water depth at the port site to accommodate sufficiently large barges. The presence of a good port site directly in front of the Boardman Space Age Park makes the venture economically and engineeringly feasible which would not be the case if no such port site existed.

Since the value of land is directly keyed to its best potential use, and since a good port site is absolutely essential to the development of the Space Age Park, I do not think it would be at all unreasonable to pay not less than $50,000 for the Castle Rock port site if the same were for sale.

/s/ A. Leppaluoto
CAPT. A. LEPPALUOTO

SUBSCRIBED and sworn to before me this 2nd day of April, 1965.

/s/ Pamela Bowes
Notary Public for Oregon
My Commission expires: 12-8-67

[fol. 53]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 63-380

[Title Omitted]

AFFIDAVIT OF SAMUEL H. MALLICOAT

STATE OF OREGON)
) ss:
County of Multnomah)

SAMUEL H. MALLICOAT, being first duly sworn upon oath depose and say:

I am the Administrator of the Division of Planning and Development, Department of Commerce, State of Oregon, and am well informed concerning the background and sequence of events relating to the acquisition by the State of Oregon of the area known as the Boardman Space Age Project near Boardman, Oregon.

Approximately five years ago, when I was the Assistant Director of the Department of Planning and Development, a possibility arose that one of the major aeronautical companies engaged in missile development might be induced to locate a missile testing or other similar site in Eastern Oregon.

Preliminary surveys were instituted and, through the assistance of personnel of the State Highway Department and a group of public spirited citizens (who formed a non-profit corporation for the sole purpose of acquiring [fol. 54] options on the necessary lands for such a site) work was begun toward acquiring the necessary options.

The physical requirements for such a site were essentially a large enough area so that the testing procedures would not disturb other inhabitants; sufficient water frontage to develop a port site for the loading and off-loading of large missiles and other heavy equipment by barge; access to rail and major arterial highways; and

sufficient area so that explosions or other testing procedures would not involve the danger of harm to other inhabitants in the area.

The only really feasible location was in the vicinity of the Boardman Bombing Range, then under the control of the United States Navy and located south and slightly west of Boardman, Oregon. To acquire sufficient acreage and the necessary waterfront necessitated acquiring title or control to the bombing range from the Navy and title or control from private owners as to the lands located between the Columbia River and the northern boundaries of the bombing range.

Over a period of months state agents acquired options to purchase or lease options from the various owners of the lands lying between the Columbia River and the Boardman Bombing Range. Meanwhile, negotiations were underway with the United States to acquire title to the bombing range.

R. B. Rands and Josephine Rands owned waterfront lands on the Columbia River and a most feasible location for construction of the necessary port facilities to service the project, once completed and in use. As a consequence, state agents consummated a lease option with Mr. and Mrs. Rands, dated November 1, 1962, a copy of which is attached hereto. The lease option was segregated into parcels, for which the sum of $150 per acre was named as the price for most of the land, and the sum of $400 per acre for that portion denominated as port-site lands; ie., Government Lot 1, Section 8, Township 4 North, Range 24 E.W.M., and Government Lots 3 and 4, Section 9, Township 4 North, Range 24 E.W.M.

Subsequently, the State of Oregon elected not to exercise its option to purchase although it retained its lease of the premises. Thereafter, the United States served the usual notices of taking on much of the land; and condem- [fol. 55] nation suits have been concluded or are now pending. Title vested in the United States, of course, effective upon the date of filing such notices and on September 25, 1963, the United States by quitclaim deed transferred title to the area between the Columbia River and the bombing range to the State of Oregon pursuant

to the authority contained in Section 108 of Public Law 86-645 relating to port and industrial lands. A copy of such deed is attached hereto. Included in the transfer were the lands of R. B. and Josephine Rands denominated as Tract 2514 in the above entitled cause.

Following the acquisition of title, the State of Oregon thereupon leased the entire area to the Boeing Company for use as a missile site, and it is under lease to that company as of this date.

/s/ Samuel H. Mallicoat
SAMUEL H. MALLICOAT

Subscribed and sworn to before me this 5th day of April, 1965.

/s/ Pamela Bowes
Notary Public for Oregon
My Commission Expires: 12-8-67

[fol. 56] ATTACHMENT TO AFFIDAVIT

LEASE OPTION

THIS AGREEMENT made as of the 1st day of November, 1962, by and between R. B. RANDS and JOSEPHINE RANDS, husband and wife, hereinafter referred to as "Landlord", and THE DEPARTMENT OF PLANNING & DEVELOPMENT OF THE STATE OF OREGON, or its assigns, hereinafter referred to as "Tenant", WITNESSETH:

THAT WHEREAS, the tenant is acquiring by lease or purchase industrial sites in North Morrow County, Oregon, for the purpose of developing industry and increasing employment opportunities in the State of Oregon, and

WHEREAS, port facilities and land adjacent thereto are an important aspect of the industrial development along the Columbia River in North Morrow County, Oregon,

NOW, THEREFORE, in consideration of the sum of Ten Dollars ($10.00) and other valuable consideration, the landlord does hereby lease unto the tenant the lands hereinafter described and also grants to the tenant the option to purchase the property hereinafter described for and in consideration of the sums hereinafter mentioned for a term of ten years or until the pool of the John Day Dam has been raised to its final heighth for a period of six months, whichever shall occur first. During the term of this lease, the tenant, or its assigns, shall have the right to purchase the land hereinafter described for the prices hereinafter set forth by giving written notice of the exercise of its option to the landlord at Boardman, Oregon, or to such other address as the landlord shall give to the tenant in writing.

The landlord gives the tenant the right to purchase the following described property for One Hundred Fifty Dollars ($150.00) per acre under the terms of the option above mentioned:

[fol. 57] Township 4 North, Range 24, East of the Willamette Meridian

Section 10 All that portion of Lots 1, 2, 3 and 4, lying North of the O.R.R. & N. Railroad line, comprising 83.8 acres, more or less, except the landlord reserves unto themselves, their heirs and assigns, all rights to gravel deposits upon these premises, and the right to remove the same.

Section 9 Lots 1 and 2, comprising 30.5 acres, more or less

Section 8 Lot 2, comprising 5 acres, more or less

Township 4 North, Range 23, East of the Willamette Meridian

Section 13 Lots 1, 2, 3 and 4, comprising 106.5 acres, more or less.

The tenant agrees to pay Four Hundred Dollars ($400.00 per acre for the port site property described as follows:

Township 4 North, Range 24, East of the Williamette Meridian

Section 8 Lot 1, comprising 12 acres, more or less

Section 9 Lots 3 and 4, comprising 50 acres, more or less

The landlord and tenant agree that the exact acreage to be purchased by the tenant under the terms of this option shall be based upon a survey made of the area by a certified surveyor mutually agreeable to the landlord and to the tenant.

DONE and DATED as of the 1st day of November, 1962.

R. B. RANDS

JOSEPHINE RANDS
LANDLORD

S. H. MALLICOAT
Director of the Department of Planning & Development of the State of Oregon

TENANT

[fol. 58] ATTACHMENT TO AFFIDAVIT

QUITCLAIM DEED

THIS INDENTURE, made by and between the United States of America, acting by and through the Secretary of the Army, under and pursuant to the powers and authority contained in Section 108 of the Act of Congress approved July 14, 1960 (Public Law 86-645; 74 Stat. 486), party of the first part, and the State of Oregon acting by and through its State Land Board, party of the second part.

WHEREAS, pursuant to said Act and to the Delegations, Rules and Regulations of the Secretary of the Army, as published in the Federal Register of March 11, 1961 (Volume 26, No. 47, pages 2117 - 2118), it has been determined (1) that the development of port and industrial facilities on the hereinafter described land within the John Day Lock and Dam Project, a water resource development project under the jurisdiction of the Department of the Army, will be in the public interest; (2) that such development will not interfere with the operation and maintenance of the John Day Lock and Dam; and (3) that disposition of such land for this purpose will serve the objectives of the John Day Lock and Dam Project.

NOW, THEREFORE, the party of the first part, for and in consideration of the sum of SEVENTEEN THOUSAND FIVE HUNDRED AND NO/100 Dollars ($17,500.00) hereby conveys and quitclaims unto the party of the second part, its successors and assigns, for port and industrial purposes in accordance with the provisions of Section 108 of Public Law 86-645, subject to the exceptions, reservations, restrictions, covenants and conditions hereinafter set forth, all right, title and interest of the United States of America in and to the real estate described as follows:

A tract of land lying in Sections 13, 14, 15, 19, 20, 21, 22, 23 and 30 in Township 4 North, Range 23, and Sections 7, 8, 9, 10, 15, 17 and 18 in Township 4 North, Range 24 all East of the Willamette Meridian, Morrow

County, Oregon, said tract of land being more particularly described as follows:

Beginning at the point of intersection of the west line of said Section 30 and the southerly right-of-way line of the hereinafter described proposed relocation of the Oregon-Washington Railroad and Navigation Company's right of way;

thence southerly along said west line of Section 30 to the existing northerly right-of-way line of U. S. Highway No. 30;

thence northeasterly along said right-of-way line to the south line of the northeast quarter of the northwest quarter of said Section 30;

thence easterly along said south line to the southeast corner thereof;

thence northerly along the east line of said northeast quarter of the northwest quarter to said existing northerly right-of-way line of U. S. Highway No. 30;

thence northeasterly along said right-of-way line to the east line of said Section 30;

thence northerly along said east line to the northeast corner thereof;

thence easterly along the south line of said Section 20 to the southeast corner thereof;

thence northerly along the east line of said Section 20 to said existing northerly right-of-way line of U. S. Highway No. 30;

thence northeasterly along said right-of-way line to the west line of the southeast quarter of the northwest quarter of said Section 22;

thence southerly along said west line to the southwest corner thereof;

thence easterly along the south line of the southeast quarter of the northwest quarter and the south line of the southwest quarter of the northeast quarter of said Section 22 to the southeast corner thereof;

[fol. 59] thence northerly along the east line of said southwest quarter of the northeast quarter to said existing northerly right-of-way line of U. S. Highway No. 30;

thence northeasterly along said right-of-way line to the east line of said Section 23;

thence northerly along the east line of said Section 23 and 14 to a point lying 475 feet northerly of the southeast corner of said Section 14;

thence North 75°42'17" East to a point on the east line of the southwest quarter of the southwest quarter of said Section 13;

thence northeasterly along a straight line to the northeast corner of the south half of the southwest quarter of said Section 13;

thence easterly along the south line of Government Lot 2 in said Section 13 to the southeast corner thereof;

thence northerly along the east line of said Government Lot 2 a distance of 330 feet;

thence northeasterly along a straight line to a point on the east line of said Section 13, said point lying 730 feet southerly of the northeast corner of the northeast quarter of the southeast quarter of said Section 13;

thence southerly along the east line of said Section 13 to the southwest corner of Government Lot 5 in said Section 18;

thence easterly along the south line of said Government Lot 5 to the southeast corner thereof;

thence northerly along the east line of said Government Lot 5 to the northeast corner thereof;

thence easterly along the east-west center line of said Section 18 to the east line thereof;

thence northerly along the west line of said Section 17 to a point lying 4,360 feet from the southwest corner thereof;

thence North 83°16'28" East a distance of 2,135 feet;

thence northeasterly along a straight line to the southwest corner of said Section 9;

thence easterly along the south line of said Section 9 to the southeast corner thereof;

thence southerly along the west line of said Section 15 in Township 4 North, Range 24 East to said existing northerly right-of-way line of U. S. Highway No. 30;

thence easterly along said northerly right-of-way line to the east line of said Section 15;

thence northerly along the east line of said Sections 15 and 10 to a point on the ordinary high-water line on the south bank of the Columbia River;

thence westerly along said ordinary high-water line to the west line of Government Lot 3 in said Section 21;

thence southerly along said west line of Government Lot 3 to a point lying northerly a distance of 430 feet from the southwest corner of said Government Lot 3;

thence North 88°38'11" East to a point on the west line of Government Lot 1 in said Section 21;

thence southeasterly along a straight line to the southeast corner of said Government Lot 1;

thence easterly along the south line of Government Lot 4 in said Section 22 to the southeast corner thereof;

thence southerly along the west line of the southeast quarter of the northwest quarter of said Section 22 to said southerly right-of-way line of the hereinafter described proposed relocation of the Oregon-Washington Railroad and Navigation Company's right of way;

thence southwesterly along said right-of-way line to the point of beginning.

Also a tract of land lying in the east half of said Section 23, said tract of land lying southerly of the existing southerly right-of-way line of U. S. Highway No. 30 and northerly of the following described line:

Beginning at the point of intersection of the existing northerly right-of-way line of U. S. Highway 30 and the east line of said Section 23;

thence South 74°56'20" West, a distance of 1,670 feet;

thence South 42°26'00" East, a distance of 640 feet;

[fol. 60] thence South 11°51'00" West, a distance of 1,130 feet;

thence North 86°31'00" West, a distance of 530 feet;

thence North 02°06'00" West, a distance of 870 feet;

thence North 28°50'00" West, to said northerly highway right-of-way line;

thence South 74°56'20" West, to the intersection of said highway right-of-way line and the west line of the northeast quarter of said Section 23 and the point of terminus of the above-described line.

There is excepted therefrom all that portion lying within the above-referred-to proposed relocation of the right of way for the Oregon-Washington Railroad and Navigation Company, said right of way lying at variable distance on each side of the following-described center-line survey;

Commencing at a point lying North 86°33'19" West a distance of 3,250.76 feet from the west quarter corner of said Section 30;

thence North 72°57'47" East a distance of 1,011.38 feet to Equation Station 5790 + 38.88 P.T. Back which equals station 5790 + 16.91 P.T. Ahead and the TRUE POINT OF BEGINNING;

thence North 72°57'47" East a distance of 7,391.96 feet to Station 5864 + 08.87 P.C.;

thence easterly along an increasing spiral curve to the right through a delta angle of 0°06′18″ a distance of 70 feet to Station 5864 + 78.87 P.C.C.;

thence easterly along a 0°18′ curve to the right a distance of 843.87 feet to Station 5773 + 22.74 P.C.C.;

thence easterly along a decreasing spiral curve to the right through a delta angle of 0°06′18″ a distance of 70 feet to Station 5773 + 92.74 P.T., which point lies North 87°32′41″ West a distance of 4,909.17 feet from the southeast corner of said Section 20;

thence North 75°42′17″ East a distance of 31,607.26 feet to Equation Station 6090 + 00, which point lies North 47°38′29″ East a distance of 177.69 feet from the southwest corner of said Section 13;

thence continuing North 75°42′17″ East a distance of 8,222.31 feet to Station 6172 + 22.31 P.C.;

thence easterly along an increasing spiral curve to the right through a delta angle of 0°6′18″ a distance of 70 feet to Station 6172 + 92.31 P.C.C.;

thence easterly along a 0°18′ curve to the right a distance of 1,442.98 feet to Station 6200 + 33.19 P.C.C.;

thence easterly along a decreasing spiral curve to the right through a delta angle of 0°6′18″ a distance of 70 feet to Equation Station 6201 + 03.19 P.T. Back which equals Station 6203 + 10.85 P.T. Ahead;

thence North 84°08′14″ East a distance of 4,689.15 feet to Station 6250 + 00 which point lies South 7°41′39″ West a distance of 2,432.98 feet from the northeast corner of said Section 17;

thence continuing North 84°08′14″ East a distance of 12,000.00 feet to Station 6370 + 00 which point lies South 38°52′04″ East a distance of 1,469.66 feet from the southeast corner of said Section 10 and the point of terminus of the above-described center line.

The width (in feet) measured at right angles and/or radially from the above-described center-line survey is as follows:

STATION	TO STATION	WIDTH NORTHERLY OF CENTER LINE	WIDTH SOUTHERLY OF CENTER LINE
5790 + 38.88 P.T.			
5790 + 16.91 P.T.	5880 + 00	100	100
5880 + 00	5884 + 00	130	100
5884 + 00	5931 + 00	100	100
5931 + 00	5938 + 00	180	140
5938 + 00	6064 + 00	100	100
6064 + 00	6064 + 50	240	100
6064 + 50	6074 + 00	240	180
6074 + 00	6075 + 00	240	100
6075 + 00	6238 + 00	100	100
6238 + 00	6246 + 00	100	200
6246 + 00	6253 + 00	100	120
6253 + 00	6370 + 00	100	100

[fol. 61] There are also excepted therefrom all those portions of Government Lots 1, 2, and 3 in Section 21, all of Sections 13 and 15 in said Township 4 North, Range 23 East, and Section 9 in said Township 4 North, Range 24 East, lying within the existing right of way for the Oregon-Washington Railroad and Navigation Company.

The land above described contains 2,261.00 acres, more or less.

NOTE: All bearings are referred to the Oregon Coordinate System, North Zone, unless otherwise specified.

SUBJECT TO the following exceptions, and rights outstanding in third parties:

1. Existing easements for public roads and highways, public utilities, railroads and pipelines.

2. Conditions contained in Public Land Order No. 3237 dated 24 September 1963 withdrawing and reserving certain of the lands herein conveyed for the John Day Lock and Dam Project.

EXCEPTING, SAVING AND RESERVING unto the United States of America and its assigns, from this conveyance the following rights, powers, privileges and easements, namely:

1. The perpetual right, power, privilege and easement in, upon, over and across lands described herein for the purpose of inundation, overflow, saturation, percolation and wave action which may result from a pool, including backwater effect, created by water level at John Day Dam to elevation 268 feet above mean sea level, U.S.C. & G.S. Datum; provided no structures for human habitation shall be constructed or maintained on said land, and provided further that no structures shall be constructed on the land except as may be approved in writing by the representative of the United States in charge of the project.

2. The right to construct, operate and maintain navigation markers, aids, and/or ranges, water gaging stations, communication facilities, access roads, their appurtenances, and other facilities necessary and/or convenient for the operation and maintenance of the John Day Lock and Dam Project consistent with the operations of port and industrial facilities on said lands.

3. The right of the officers, agents and employees of the United States to enter upon the lands hereby conveyed at any time and for any purpose necessary or convenient in connection with the reservations and conditions and the operation and maintenance of the John Day Lock and Dam Project in order to fully accomplish the several purposes for which said project was authorized, provided such entry shall be exercised at such times and for such purposes as not to interfere unreasonably with port and industrial operations.

AND FURTHER, excepting, saving and reserving to the United States the right and easement until 31 December 1974, to clear, borrow, excavate and remove rock, soil and other similar materials from the following described land:

A tract of land lying in Government Lots 3 and 4, in Section 18, Township 4 North, Range 24 East of the

Willamette Meridian, Morrow County, Oregon, said tract of land being described in two (2) parcels as follows:

[fol. 62] *Parcel a:* Commencing at a point lying South 67°49'01" West, a distance of 6729.70 feet from the quarter Section corner common to Sections 8 and 17 of said Township and Range;

thence North 57°53'23" East, a distance of 1011.99 feet to THE TRUE POINT OF BEGINNING;

thence South 57°53'23" West, a distance of 1156.99 feet;

thence North 32°06'37" West, to a point on the southerly right-of-way line of the Oregon-Washington Railroad and Navigation Company;

thence northeasterly along said southerly right-of-way line, to a point of intersection with a line bearing North 32°06'37" West from the point of beginning;

thence South 32°06'37" East to the point of beginning.

Parcel b: Beginning at a point lying South 67°49'01" West, a distance of 6729.70 feet from said quarter Section corner common to Sections 8 and 17;

thence South 32°06'37" East, a distance of 500 feet;

thence North 57°53'23" East, a distance of 150 feet;

thence North 32°06'37" West, a distance of 500 feet;

thence South 57°53'23" West, a distance of 150 feet to the point of beginning.

The tract of land above described contains 21.90 acres, more or less;

together with the right and easement to construct, operate, maintain and repair an access road thereto, over and across the lands herein conveyed; PROVIDED, that the exercise of such rights and easements shall not unreason-

ably interfere with the development or operation of the lands conveyed for the purposes provided herein.

If it is determined by the party of the second part that the exercise of such reserved rights and easements by the United States unreasonably interferes with the development and use of the lands conveyed herein, then, and in that event, the United States will terminate its use of said lands and remove any equipment or improvements placed thereon by the United States or its contractors and will convey such reserved rights and easements to the party of the second part without additional monetary consideration; PROVIDED, that prior to such vacation and conveyance, and as a condition thereto, the United States shall have without cost, comparable rights and easements in a substitute source of materials acceptable to the United States.

The said party of the second part does by the acceptance of this deed, covenant and agree for itself, its successors and assigns, forever, as follows:

1. That the use of said lands by the party of the second part, its successors or assigns will be such that conditions allowing erosion of the lands due to wind or wave action or other causes will not be created or enhanced. Should erosion due to such use by the party of the second part, its successors or assigns, take place in such volume or extent that, in the opinion of the representative of the United States in charge of the John Day Lock and Dam Project, the value of these or neighboring areas is materially reduced or activities adversely affected, the party of the second part, its successors or assigns will, without cost or expense to the United States, take such action as is necessary or expedient to stabilize, rehabilitate and protect the areas affected by erosion to the satisfaction of the said representative of the United States.

[fol. 63] 2. That the lands herein conveyed shall not be used in any manner which will result in the deposit of any material, floatable or non-floatable, into the John Day reservoir or liable to be washed into the reservoir by storms or floods or otherwise which materials would be detrimental to navigation and/or to the operation of the John Day Lock and Dam Project.

3. To comply with all State and Federal laws and regulations with regard to the disposal or emptying of pollutants of any nature into the waters of the John Day reservoir.

4. To obtain any permit(s) required by Section 10 of the Act of March 3, 1899 (30 Stat. 1151; 33 U.S.C. 403).

5. That portions of the lands conveyed on which development has not commenced will remain open for public access, provided, however, that the party of the second part, its successors or assigns, shall not be required to construct road access or improvements other than for port and industrial purposes.

6. To use the land herein conveyed for port and industrial purposes in accordance with the provisions of Section 108 of Public Law 86-645 and to develop port and industrial facilities thereon within twenty (20) years from the date of this deed, substantially in accordance with the plan of development, dated March 1963, entitled, "A Waterfront Plan for the Boardman Space Age Industrial Park," which plan is on file in the office of the District Engineer, Walla Walla, Washington, and in the office of the Oregon State Land Board, Salem, Oregon.

PROVIDED, HOWEVER, that if the land herein conveyed, or any part thereof, be used for other than port and industrial purposes by the party of the second part, its successors or assigns, or in the event the said party of the second part, its successors or assigns, fail to develop port and industrial facilities as required by Condition 6 above, then all right, title and interest to the land herein conveyed shall revert to and become property of the United States at its option, subject to the conditions hereinafter set forth, provided, however, the sole remedy of the United States of America, in event of such breach, shall be the exercise of its option of reverter.

In the event of a breach of the above condition pertaining to port and industrial use, the United States of America, before claiming any forfeiture hereunder, shall give notice in writing of said breach to the then owner of the premises. Said owner shall within a period of ninety (90) days after receipt of such notice, initiate steps to correct and cure said breach, and thereafter pro-

ceed with due diligence until completion of the same within one (1) year from said notice. In the event of the failure or refusal of the then owner to correct and cure said breach as aforesaid, said owner shall have a reasonable time, not to exceed 180 days, to remove any improvements that have theretofore been placed upon said premises. Such right of removal shall under no circumstances permit the owner to cause damage to the land involved. In the event that said owner fails to remove said improvements within the time limited, they shall become the property of the United States of America.
[fol. 64] Failure of the United States to serve notice in the event of a breach of any condition or covenant herein imposed shall not be construed as a waiver or relinquishment of the said reversionary rights of the United States.

The party of the second part, its successors or assigns shall reconvey to the United States of America by quitclaim deed any lands which may so revert as the result of breach of any condition or covenant herein imposed, free and clear of all liens and encumbrances created thereon by the party of the second part, its successors or assigns.

TO HAVE AND TO HOLD the above-described premises unto the said party of the second part, its successors and assigns, forever, subject to the exceptions, reservations, restrictions, covenants and conditions herein contained.

IN WITNESS WHEREOF, the United States of America has caused these presents to be executed in its name by Cyrus R. Vance, Secretary of the Army, and the seal of the Department of the Army to be hereunto affixed this 25th day of September, 1963.

UNITED STATES OF AMERICA

By /s/ Cyrus Vance
Secretary of the Army

[SEAL]

The Foregoing Instrument is accepted for and in behalf of the State of Oregon by its State Land Board and its seal hereunto affixed this 30th day of September, 1963.

By /s/ [Illegible]
Governor

/s/ [Illegible]
Secretary of State

/s/ [Illegible]
State Treasurer

[fol. 65]

STATE OF VIRGINIA)
) ss:
County of Arlington)

25 September 1963. Personally appeared Cyrus R. Vance, who, being duly sworn did say that he is the Secretary of the Army, United States of America, and that the seal affixed to the foregoing instrument is the official seal of the Department of the Army and that said instrument was signed and sealed in behalf of the United States of America under authority of the cited act of Congress; and he acknowledged said instrument to be its voluntary act and deed. Before me:

/s/ A. F. Spada

Notary Public
Arlington County, Virginia

My Commission Expires:

A. F. SPADA, Notary Public
County of Arlington
State of Virginia
My Commission Expires 28 July 1964
96453 Indexed

STATE OF OREGON)
) ss:
County of Morrow)

I Certify that the within instrument was received and filed for record on the 1st day of October 1963 at 10:05 a.m. and duly recorded in book 69, pages 473-480, inc.

STATE OF OREGON)
) ss:
County of Morrow)

I, Sadie Parrish, Clerk of the County Court and ex-officio Clerk of the Circuit Court, hereby certify that the above and foregoing copy:

QUITCLAIM DEED

has been by me compared with the original and that the same is a true and correct transcript of the whole thereof as the same appears of record and on file in my office and in my custody.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 26th day of March, 1965.

/s/ SADIE PARRISH
Clerk of Morrow County, Oregon

[fol. 66]

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

Civil No. 63-380

[File Endorsement Omitted]

[Title Omitted]

VERDICT TRACT No. 2514—April 6, 1965

We, the trial jury, duly empaneled to try the above cause, do find that the sum of $7,000.00 is just compensation for the property taken, to-wit: Tract No. 2514.

DATED this 6th day of April, 1965.

/s/ ZOE W. MORGAN
Foreman

[fol. 67]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 63-380

[File Endorsement Omitted]

[Title Omitted]

STIPULATION FOR JUDGMENT, TRACT 2403—
Filed April 16, 1965

IT IS HEREBY STIPULATED AND AGREED by and between plaintiff and R. B. Rands and Josephine Rands, husband and wife, defendants herein, by and through their attorney, Alex L. Parks, as follows:

(1) The Court may enter judgment herein awarding the estate and interest in the land designated as Tract No. 2403, and described in the complaint in condemnation to plaintiff as prayed for in said complaint.

(2) Just compensation payable to plaintiff for the taking of said estate in land shall be the sum of $2,420.00, inclusive of interest.

DUSENBERY, MARTIN,
BEATTY & PARKS

/s/ Alex Parks
Attorneys for the defendants
Rands

/s/ Sidney I. Lezak
United States Attorney,
District of Oregon

[fol. 68]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 63-380

[File Endorsement Omitted]

UNITED STATES OF AMERICA, PLAINTIFF

vs.

JAMES FOX, R. B. RANDS, ET AL., DEFENDANTS

JUDGEMENT IN CONDEMNATION, TRACTS 2403 AND 2514—
April 6, 1965

This action having been tried and a verdict fixing just compensation having been duly rendered on the 6th day of April, 1965, as to Tract 2514, and the parties having stipulated as to Tract 2403,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that title to Tracts Nos. 2403 and 2514 described in the Declaration of Taking herein, became vested in plaintiff on August 13, 1963, and that just compensation which plaintiff shall pay for the taking of the estate is the total sum of $9,420.00, together with interest at the rate of six percent per annum on the sum of $1,620.00 from the 13th day of August, 1963 until said sum of $1,620.00 shall be deposited in the Registry of the Court.

ENTERED this 6 day of April, 1965.

/s/ John F. Kilkenny
Judge

PRESENTED BY:

/s/ Joseph E. Buley
Assistant United States Attorney

[fol. 69]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 63-380

[File Endorsement Omitted]

[Title Omitted]

NOTICE OF APPEAL BY DEFENDANTS RANDS—
Filed June 4, 1965

NOTICE is hereby given that R. B. Rands and Josephine Rands, husband and wife, defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on April 6th, 1965.

DATED: This 4th day of June, 1965.

DUSENBERY, MARTIN, BEATTY & PARKS

By /s/ Alex L. Parks
Of Attorneys for said defendants
Office and Post Office Address
1107 Standard Plaza
Portland, Oregon

[fol. 70]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 63-380

[File Endorsement Omitted]

[Title Omitted]

STIPULATION RE APPEAL BOND—Filed June 4, 1965

IT IS HEREBY STIPULATED by and between the parties hereto through their respective attorneys that the bond on appeal under Rule 73(c) of the Federal Rules of Civil Procedure may be dispensed with in connection with defendants' appeal to the United States Court of Appeal for the Ninth Circuit from the judgment entered herein on April 6, 1965, and the defendants, and each of them, are hereby relieved from the necessity of filing any such bond.

Counsel for defendants further stipulate that they will pay all costs accrued by the Clerk incident to the preparation of the record and docketing of said appeal.

DATED this 4th day of June, 1965.

UNITED STATES ATTORNEY

By: /s/ Joseph E. Buley
Assistant U. S. Attorney

DUSENBERY, MARTIN, BEATTY & PARKS

By: /s/ Alex L. Parks
Of Attorneys for Defendants-Appellants

[fol. 71]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 63-380

[File Endorsement Omitted]

[Title Omitted]

STATEMENT OF POINTS—Filed July 9, 1965

The points upon which appellants intend to rely on this appeal are as follows:

(1) The court erred in not permitting appellants to amend their Notice of Appearance to assert an affirmative defense that the plaintiff United States of America lacked authority and jurisdiction to take the property in question because it was not taken for a "public purpose"; and

(2) The court erred in refusing to permit appellants to introduce evidence before the jury of the value of a portion of said property as a port-site; to-wit, Government Lots 1 and 2, Section 8, Township 4 North, Range 24 East, Willamette Meridian.

DATED: This 9th day of July, 1965.

DUSENBERY, MARTIN, BEATTY & PARKS

By /s/ Alex L. Parks
Of counsel for Appellants R. B. and Josephine Rands

[fol. 72]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 63-380

[File Endorsement Omitted]

[Title Omitted]

STIPULATION AS TO RECORD ON APPEAL—
Filed July 9, 1965

IT IS HEREBY STIPULATED by and between the parties hereto that the record on appeal herein shall consist of the following items:

(1) Complaint

(2) Declaration of Taking dated July 12, 1963, and filed August 13, 1963.

(3) Notice of Appearance by appellants' Rands.

(4) Motion by appellants' Rands to amend Notice of Appearance to permit assertion of affirmative defenses, with accompanying affidavit in support of motion, dated September 26, 1963

(5) Judgment on Declaration of Taking and Order of Possession

(6) Opinion and Order dated October 16, 1963, denying Motion to Amend Notice of Appearance

(7) Memorandum Opinion dated October 12, 1964, relative to question presented in advance of trial as to admissibility of evidence relating to value of a portion of appellants' lands as a port-site

(8) Stipulation for Judgment on Tract 2403

[fol. 73] (9) Pre-Trial Order dated April 5, 1965

(10) Reporter's Transcript relative to limited offer of proof relating to port-site value

(11) Stipulation dated April 6, 1965, relative to offer of proof and accompanying affidavits accepted under offer of proof

(12) Verdict dated April 6, 1965, relating to Tract 2514

(13) Judgment on Tract 2403 and 2514
(14) Notice of Appeal dated June 4, 1965
(15) This Stipulation

DATED: This 9th day of July, 1965.

DUSENBERY, MARTIN, BEATTY & PARKS

By /s/ Alex L. Parks
Of counsel for defendants R. B. and Josephine Rands

SIDNEY LEZAK, United States Attorney

By /s/ Joseph Buley
Assistant United States Attorney
Of counsel for Plaintiff United States of America

[fol. 74]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 63-380

[File Endorsement Omitted]

[Title Omitted]

MOTION—Filed July 9, 1965

COMES now the appellants in the above entitled cause and moves the Court for an order extending the time to and including July 23rd, 1965 in which to prepare and file the record on file in the above entitled cause.

In support of the above motion, reference is made to the Stipulation and affidavit of counsel attached hereto.

DATED this 9th day of July, 1965.

DUSENBERY, MARTIN, BEATTY & PARKS

By /s/ Alex L. Parks
Of counsel for appellants' Rands

[fol. 75]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 63-380

[File Endorsement Omitted]

[Title Omitted]

STIPULATION—Filed July 9, 1965

IT IS HEREBY STIPULATED by and between the parties hereto that the appellants' may request an extension of time to and including July 23rd, 1965 for the Clerk of the Court to complete the preparation and filing of the record on appeal in the above entitled cause, and that the plaintiff UNITED STATES OF AMERICA has no objection thereto.

DATED this 9th day of July, 1965.

DUSENBERY, MARTIN, BEATTY & PARKS

By /s/ Alex L. Parks
Of counsel for appellants' Rands

SIDNEY LEZAK, United States Attorney

By /s/ Joseph E. Buley
Assistant United States Attorney
Of counsel for Plaintiff United States of America

[fol. 76]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 63-380

[File Endorsement Omitted]

[Title Omitted]

AFFIDAVIT OF ALEX L. PARKS—Filed July 9, 1965

STATE OF OREGON)
) ss
County of Multnomah)

ALEX L. PARKS, being first duly sworn on oath deposes and says:

That he is one of the counsel of record for appellants' R. B. and Josephine Rands in the above entitled cause.

That the parties to the appeal agreed locally upon a Stipulation as to Designation of Record on Appeal, and that the form thereof was transmitted to the office of the Attorney General, Washington, D.C. for formal approval. That such approval was not forthcoming until on or about July 8, 1965.

That the record on appeal in the above entitled cause must be filed with the Court of Appeals, Ninth Circuit, on or before July 14th and the Clerk of the Court indicates that the same cannot be prepared and filed by that date due to the late filing of the said Stipulation as to Designation of Record.

That a brief extension of time to and including the 23rd dayof July, 1965, in which to prepare and file said record on appeal would enable the clerk to do so.

[fol. 77] DATED: This 9th day of July, 1965.

/s/ Alex L. Parks

SUBSCRIBED and sworn to before me this 9th day of July, 1965.

/s/ Pamela Bowes
Notary Public for Oregon
My commission expires: 12-8-67

[fol. 78]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 63-380

[File Endorsement Omitted]

[Title Omitted]

ORDER—July 9, 1965

THIS MATTER having come before the Court upon motion of appellants' Rands for an order extending the time in which the record on appeal may be filed with the Court of Appeals, and the Court being fully advised in the premises, and there being good cause shown therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that appellants Rands are hereby granted an extension of time to and including July 23, 1965, in which to file the record on appeal in the above entitled cause with the Court of Appeals.

DATED this 9th day of July, 1965.

/s/ John F. Kilkenny
Judge

[fol. 79]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 63-380

[File Endorsement Omitted]

[Title Omitted]

STIPULATION AND ORDER

IT IS HEREBY STIPULATED by the parties to the above-entitled cause that the Clerk may release the files and records in this cause for the purpose of having the same photocopied in connection with the pending appeal.

DATED this 16th day of July.

DUSENBERY, MARTIN, BEATTY & PARKS

By /s/ Alex L. Parks
Of counsel for defendants-appellants

SIDNEY LEZAK, United States Attorney

By /s/ Joseph E. Buley
Assistant U. S. Attorney
Of counsel for plaintiff-respondent

IT IS SO ORDERED this 19th
day of July, 1965.

/s/ John F. Kilkenny
Judge

[fol. 80]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 63-380

* * * *

[Title Omitted]

STIPULATION AND ORDER

IT IS HEREBY STIPULATED by the parties to this cause that the Clerk may transmit the original exhibits to the Court of Appeals in connection with the pending appeal.

DATED this 16th day of July, 1965.

DUSENBERY, MARTIN, BEATTY & PARKS

By /s/ Alex L. Parks
Of counsel for defendants-appellants

SIDNEY LEZAK, United States Attorney

By /s/ Joseph E. Buley
Assistant U. S. Attorney
Of counsel for plaintiff-respondent

IT IS SO ORDERED this 19th day of July, 1965.

/s/ John F. Kilkenny
Judge

[fol. 81]

IN THE UNITED STATES DISTRICT COURT

Amend Notre by Interlineation

Jury demand date: August 13, 1963 Pltf.
Feb. 24, 1964—Deft.

UNITED STATES OF AMERICA, PLAINTIFF

vs.

JAMES FOX and EMMA FOX, husband and wife; GEORGE L. FOX and LUCILE H. FOX, husband and wife; A. H. HARDING and ESTHER E. HARDING, husband and wife; H. G. GOSNEY, doing business as Umatilla Sand and Gravel Company; GEORGE SHANE, JR., a single man; R. B. RANDS and JOSEPHINE RANDS, husband and wife; FERDINAND EMBERGER and JANE DOE EMBERGER, husband and wife; ROYAL H. RANDS and LOUISE RANDS, husband and wife; WEST EXTENSION IRRIGATION DISTRICT; NORTHERN PACIFIC RAILWAY COMPANY; FANNIE SLEVIN, a single woman; CLYDE HOYT and NELLIE HOYT, husband and wife; JAMES F. MCMILLIN and MADELINE MCMILLIN, husband and wife; ROBERT HOYT and THULA HOYT, husband and wife; MARVIN SIMMONS, and NORMA J. SIMMONS, husband and wife; STATE OF OREGON; GILLIAM COUNTY, MORROW COUNTY, SHERMAN COUNTY, AND UMATILLA COUNTY, municipal corporations and political subdivision of the State of Oregon, and 341.47 ACRES OF LAND, more or less, situate in Gilliam, Morrow, Sherman and Umatilla Counties, State of Oregon, DEFENDANTS

Call Date: Oct. 21, 1963

For plaintiff:

Sidney I. Lezak, Act. U.S. Atty.
506 U.S. Courthouse
Portland, Oregon
Joseph E. Burley, Asst. U.S. Atty.

For defendants Rands: Dusenbery, Martin, Beatty & Parks; 1107 Standard Plaza (4) and Mahoney & Abrams;
Robert B. Abrams
P. O. Box 428, Heppner, Ore.

For Northern Pac. Rlwy. Co.:
Don H. Marmaduke; Rockwood, Davies, Biggs, Strayer and Stoel
1410 Yeon Bldg. (4)

For defts. McMillan: Mahoney & Abrams
Robt. B. Abrams P. O. Box 428, Heppner, Ore. (also for defts. Hoyt,

For defts. Harding: Wilbur K. Wilson
414 Pittock Block (5)

For defts. Marvin and Norma Simmons
Currin & French, Pendleton, Oregon

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 5 mailed SEP 5 1963	Clerk		US		
		1965			
J.S. 6 mailed MAY 5 1965	Marshal	6/4	34477	5.00	
		"	Treas.		5.00
Basis of Action: Land Condemnation	Docket fee				
	Witness fees				
Action arose at:	Depositions				

[fol. 82]

DOCKET ENTRIES

Date			Date Order or Judgment Note
1963			
Aug.	13	Filed Complaint In Condemnation and Demand for Jury Trial	
	13	Filed Declaration of Taking	
	13	Issued Notice to Marshall	
	14	Filed and entered Judgment on the Declaration of Taking and Order of Immediate Possession re tracts 2164, 2165-1, 2165-2, 2403, 2514 and 2528 as of Aug. 14 1963 and further Order of Immediate Possession on Tracts 1617-1. 1617-2, 3300, 3305 and 3313 as of January 1, 1964	E
Sep	3	Filed Notice of Appearance of defts. R. B. Rands and Josephine Rands	
	3	Filed Petition for Partial Distribution of Funds, Tracts 2403 and 2514	
	10	Filed pltf's motion to amend by interlineation, the Judgment on Declaration of Taking and Order of Immediate Possession	
	10	Filed and entered order granting pltf's motion to amend Judgment on Declaration of Taking and Order of Immediate Possession (on motion)	K
	17	Filed disclaimer of deft. Northern Pac. Rlwy. Co.	
	27	Filed Association of Counsel of the firm of Dusenbery, Martin, Beatty & Parks as co-counsel with Mahoney & Abrams for defts. Rand	
	27	Filed Motion of defts. Rands to amend their Notice of Appearance	
Oct	2	Filed deft's Memorandum of Points and Authorities	
	4	Filed pltf's Memorandum in opposition to motion re-enlargement of time to file ans.	
	7	Record of hearing on motion to amend Notice of Appearance; entered order taking under advisement	K
	14	Filed deft's supplemental points and authorities	
	16	The Court hands down an Opinion and Order and directs that it be filed	K

Date			Date Order or Judgment Note
1963			
	16	Filed and entered Opinion and Order denying motion of deft. for permission to file an answer setting up a defense challenging right to condemn deft's property	K
	18	Filed pltf's motion to amend by interlineation	
	18	Filed and entered order allowing motion to amend by interlineation, the Complaint, Notice and Judgment on Declaration of Taking and Order of Immediate Possession (on motion)	K
Nov	27	Entered order setting for pretrial conf. March 1964	K
1964			
Feb	20	Entered order setting for pretrial, Pendleton Cal., April 13, 1964 at 9:30 A.M. in Portland	K
	24	Filed notice of appearance of defts. James F. McMillan and Madeline McMillan and demand for trial by jury	
[fol. 83]			
	24	Filed notice of appearance of defts. Clyde Hoyt and Nellie Hoyt	
	24	Filed notice of appearance of defts. Robert Hoyt and Thula Hoyt	
	28	Filed pltf's motion for order of default of Gilliam Co.	
	28	Filed and entered order allowing pltf's motion for default of Gilliam Co.	K
	28	Filed stip. for judgment and pet. for distribution tracts 2165-1 and 2165-2	
	28	Filed and entered judgment in cond. in sum of $100, vesting title to estate in pltf. Aug. 3, 1963 and further that the Clerk shall disburse the sum of $100 to deft. Geo. Shane, Jr. (tracts 2165-1 and 2165-2)	K
	28	Filed notice of appearance of defts. A. H. Harding and E. E. Harding	
Mar	16	Filed and entered order of distribution, Tracts Nos. 2403 and 2514, of the sum of $6,177.80 to Defts. R. B. Rands and Josephine Rands	E
Apr	6	Entered order striking from cal. of 4/13/64 and resetting case for pretrial conf. 4/17/64 at 2:00 P.M. at Pendleton, Ore. and for trial 5/25/64 at Pendleton term of court	K

Date			Date Order or Judgment Note
1964			
	17	Record of pretrial conf Tract 2164	K
	17	Entered order setting for selection of jury 6/1/64 at 9:30 A.M.—jury view Tract 2164	K
	17	Entered order setting for trial 6/3/64 at 9:30 A.M. (tract 2164)	K
	17	Record of pretrial conf. tract 3300	K
	17	Entered order setting for selection of jury 6/1/64 at 9:30 A.M.—jury view Tract 3300	K
	17	Entered order setting for trial 6/4/64 at 9:30 A.M. Tract 3300	K
June	11	Filed pltf's mot. for order of dismissal as to defts. Ferdinand Emberger and Jane Doe Emberger	
	11	Filed and entered order allowing pltf's mot. for order of dismissal as to defts. Ferdinand Emberger and Jane Doe Emberger (on mot.)	S
	11	Stip. for judgment and pet. for distribution Tract No. 2528	
	11	Filed and entered Judgment in Condem. in sum of $300.00 inclusive of int. and order of distribution of $300.00 to deft. Fannie Slevin upon deposit of additional sum of $120.00 (Tract No. 2528)	S
	11	Filed pltf's mot. for order of default of deft. H. G. Gosney dba Umatilla Sand and Gravel Co.	
	11	Filed and entered order allowing pltf's mot. for order of default of deft. H. G. Gosney dba Umatilla Sand and Gravel Co. (on mot.)	S
	11	Filed affidavit as to military service of deft. H. G. Gosney	
	11	Filed stip. for judgment and pet. for distribution, Tract 2164	
	11	Filed and entered Judgment in Cond. in the sum of $2,000 inclusive of int. and further that the Clerk disburse the sum of $2,000 to defts. A. H. Harding and Esther Harding upon deposit of additional amt. of $900.00 (Tract No. 2164)	S

[fol. 84]

Date		Date Order or Judgment Note
1964		
June	11 Filed pltf's mot. for order of default of defts. Umatilla Co., Ore, and Sherman Co., Ore.	
	11 Filed and entered order of default of defts. Umatilla Co., Ore. and Sherman Co., Ore. (on mot.)	S
	11 Filed stip. for judgment, revestment, and pet. for distribution Tracts Nos. 1617-1 and 1617-2	
	11 Filed and entered Judgment in Cond. in sum of $3,500, revestment, that improvements must be removed from the property on or before Dec. 31, 1964 or defts/ shall forfeit right of removal; that defts/ shall not be required to construct or maintain any fence along boundary line etc. and further, that the Clerk shall disburse the sum of $1,750.00 to James Fox and Emma Fox and the sum of $1,750.00 to Geo. L. Fox and Lucile H. Fox upon deposit of additional amt. of $600.00 (Tracts 1617-1 and 1617-2)	S
July	22 Filed notice with Marshal's returns and "not served" returns as to Ferdinand Emberger, Jane Doe Emberger, Royal H. Rands	
	24 Filed stip. for judgment and pet. for distribution, Tract No. 3305	
	24 Filed and entered Judgment in Condemnation and Order of Distribution, Tract No. 3305 in sum of $950.00 to Clyde Hoyt, Nellie Hoyt, Robt. Hoyt and Thula Hoyt upon deposit of additional amt. of $790.00	K
	24 Filed stip. for judgment and pet. for distribution, Tract 3300	
	24 Filed pltf's motion for order of default of defts. West Extension Irrigation Dist. and Umatilla Co., Ore.	
	24 Filed and entered order allowing pltf's mot. for order of default of defts. West Extension Irrigation Dist. and Umatilla Co., Ore. (on mot.)	K
	24 Filed and entered Judgment in Con. and Order of Distribution, Tract 3300 in sum of $2,000 inclusive of int. and further that the Clerk shall disburse the sum of $2,000 to Clyde Hoyt, Nellie Hoyt, James F. McMillin and Madeline McMillin upon deposit of additional sum of $1,875.00	K

Date			Date Order or Judgment Note
1964			
Sep.	14	Entered order setting pretrial conference 10/9/64, 1:30 P.M., Pendleton, and order setting trial week of 10/19/64	K
	16	Entered order striking pretrial Pendleton 10/9/64 and resetting Pendleton 10/16/64, 1:30 P.M.	K
Oct.	9	Record of pretrial conference	K
	9	Entered order modifying rule in regard to number of expert witnesses and each party will be allowed 3 expert witnesses	K
Oct.	12	Filed memorandum opinion	K
	12	Filed memorandum Brief	K
[fol. 85]			
	16	Filed notice of appearance of Marvin Simmons and Norma J. Simmons, husband and wife, (Tract 3313) and demand for jury trial	
	19	PENDLETON, OREGON Record of jury trial (m 10/21/64) Tract 3313	K
	19	Filed and entered order for jury view Tract 3313 (m 10/21/64)	K
	19	Entered order that verdict be received and filed, Tract 3313 (m 10/21/64)	K
	19	Filed verdict Tract numbered 3313 that the sum of $4,750.00 is just compensation (m 10/21/64)	K
	19	Entered order that judgment be received and filed and judgment entered thereon (m 10/21/64)	K
	19	Entered judgment in condemnation, Tract No. 3313	
	23	Filed judgment in condemnation, Tract No. 3313 that plaintiff shall pay sum of $4,750.00 together with interest at the rate of 6% per annum on the sum of $1,450.00 from the 13th day of August until said sum is deposited into Registry of the Court	K
Nov.	27	Filed petition for distribution of funds Tract No. 3313	
	27	Filed and entered order of distribution of funds Tract No. 3313	E

Date			Date Order or Judgment Note
1965			
Feb.	15	Entered order setting for pretrial conference 3/9/65, 9:00 A.M. in Portland	K
Mar.	1	Entered order striking from calendar 3/8/65 and resetting for pretrial conference 3/15/65, 2:30 P.M. at Portland	
	15	Entered order pretrial order to be lodged by 3/22/65 or lodged at Pendleton on 4/2/65	K
	15	Entere order setting for trial 4/5/65, 9:00 A.M. PENDLETON	K
April	5	Record of jury trial (m 4/16/65)	K
	5	Filed and entered pretrial order (m 4/16/65)	K
	5	Filed plaintiff's motion for order of dismissal as to defendant Royal Rands	
	5	Filed and entered order allowing motion dismissing as to defendant Royal Rands (on mot.) (m 4/16/65)	K
	5	Filed plaintiff's motion for order declaring defendant State of Oregon to be in default, Tracts 2403 and 2514	K
	5	Filed and entered order allowing motion declaring State of Oregon to be in default Tracts 2403 and 2514 (on mot.) (m 4/16/65)	K
	5	Filed plaintiff's motion for order dismissing as to defendant Louise Rands	
	5	Filed and entered order allowing motion to dismiss as to defendant Louise Rands (on mot.) (m 4/16/65)	K
[fol. 86]			
	5	Filed plaintiff's motion for order dismissing as to defendants Ferdinand Emberger and Jane Doe Emberger	
	5	Filed and entered order dismissing as to defendants Emberger (on mot.) (m 4/16/65)	K
	6	Record of jury trial continued (m 4/16/65)	K
	6	Record of jury verdict in favor of defendant for $7,000 (m 4/16/65)	K
	6	Entered order that verdict be received and filed and judgment enter thereon (m 4/16/65)	K
	6	Filed verdict, Tract No. 2514 in the sum of $7,000.00, favor of defendant	

Date		Date Order or Judgment Note
1965		
	6 Filed stipulation that attached affidavits constitute limited offer of proof, etc.	
	PENDLETON	
	6 Filed and entered judgment in condemnation, Tracts 2403 and 2514 in the sum of $9,420.00 together with interest at the rate of six percent per annum on the sum of $1,620.00 from the 13th day of August 1963 until said sum of $1,620.00 shall be deposited in the Registry of the Court (m 4/16/65)	K
	16 Filed stipulation for judgment, Tract 2403	
June	4 Filed notice of appeal by defendants R. B. Rand, et ux—copy mailed to U. S. Atty.	
	4 Filed stipulation that bond on appeal may be dispensed with	
	16 Filed petition for distribution of funds	
	16 Filed and entered order for distribution of sum of $3,420.67 to defendants R. B. Rands and Josephine Rands	S
July	9 Filed Clerk's copy of Reporter's transcript of proceedings of April 6, 1965	
	9 Filed appellants' statement of points on appeal	
	9 Filed stipulation as to designation of record on appeal	
	9 Filed appellants' motion for extension of time to docket appeal	
	9 Filed stipulation in support of motion for extension of time to docket appeal	
	9 Filed affidavit of Alex L. Parks in support of motion for extension of time to docket appeal	
	9 Filed and entered order extending time to July 23, 1965 within which to docket appeal	K
	19 Filed and entered order to release record for photocopying (on stipulation)	K
	19 Filed and entered order to forward exhibits to Court of Appeals (on stipulation)	K

[fol. 86 A]

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

Civil No. 63-380

UNITED STATES OF AMERICA, PLAINTIFF

vs.

R. B. RANDS and JOSEPHINE RANDS,
husband and wife, DEFENDANTS

Pendleton, Oregon
April 6, 1965

BEFORE:

HON. JOHN F. KILKENNY, Judge.

APPEARANCES:

MR. JOSEPH E. BULEY, Assistant United States Attorney, of counsel for the Government.

MESSRS. ALEX L. PARKS and ROBERT B. ABRAMS, of counsel for the defendants.

(At the conclusion of the presentation of evidence in behalf of the defendants the following occurred out of the presence and hearing of the jury:)

MR. PARKS: This seems to be an appropriate time to make an offer of proof, based on our stipulation.

THE COURT: Yes. What is your offer?

[fol. 86 B] OFFER OF PROOF

MR. PARKS: This relates to the port site, your Honor.

THE COURT: Yes. This stipulation and the attached affidavits will be viewed by the Court as an offer of proof

that the particular area would be suitable as a port site and as to the valuations that might be placed thereon.

The offer of proof is rejected for the reasons previously given in the formal opinion of the Court.

CERTIFIED:

A true and correct partial transcript of the proceedings in the above-entitled cause.

Dated at Portland, Oregon, this 6th day of July, 1965.

/s/ John S. Beckwith
JOHN S. BECKWITH
Official Court Reporter

[fol. 87]

[Clerk's Certificate to foregoing transcript omitted in printing]

[fol. 89]

[Minute entry of argument and submission—March 7, 1966, omitted in printing]

[fol. 90]

[Minute entry of order directing filing of opinion and filing and recording of judgment—October 7, 1966, omitted in printing]

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 20,280

R. B. RANDS, ET UX., APPELLANTS

vs.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Oregon

OPINION—October 7, 1966

Before: BARNES, KOELSCH and DUNIWAY, Circuit Judges

DUNIWAY, Circuit Judge:

Appellants owned two tracts of land along the Columbia River, about six miles upstream from the present John Day Dam. On November 1, 1962, they leased this and other property to the state of Oregon, which wanted it for an industrial park. That industrial development, for maximum utility, required access to the Columbia River; because two railroads and the United States owned most of the land along the river, appellants' property was especially valuable as a port site. The lease agreement gave Oregon an option to purchase the land. Most of the land was priced, under the option, at $150 per acre; the balance, denominated "port site property" in the agreement, was priced at $400 per acre.

The option was never exercised. On August 13, 1963, the United States filed a Declaration of Taking in the United States District Court, condemning this and other property in connection with the river development project of which the John Day Dam is a part. On September 25, 1963, the Secretary of the Army granted this and other land to the state of Oregon by a federal deed. Its use passed to a private corporation under a lease from the [fol. 92] state of Oregon dated July 2, 1963. The record does not show and we are not told how much of the sale price or rents paid for the whole block of land involved are attributable to the two tracts in suit.

In response to the notice of taking, appellants filed a notice of appearance on September 3, 1963, contesting the amount of proposed compensation and requesting partial distribution of funds. On September 27 they filed a motion requesting permission to call their earlier appearance an answer and to amend it to raise defenses to the taking of their property. They assign as error the district court's refusal, under Rule 71A, F. R. Civ. P., to permit variance, under the excusable neglect provisions of Rules 6(b) and 60(b), from the requirement of Rule 71A that objections to the taking itself be filed within 20 days from service of the notice of taking. Upon trial of the compensation issue, the district court held, relying on *United States* v. *Twin City Power Co.*, 1956, 350 U.S. 222, and *United States* v. *Virginia Elec. & Power Co.*, 1961, 365 U.S. 624, that that element of value of the land arising from its utility as a port site is noncompensable under the Fifth Amendment. Appellants say that that holding too is erroneous.

I. *Late Amendment under Rule 71A, F.R.Civ.P.*

Rule 71A(e) provides that "If a defendant has any objection or defense to the taking of his property, he shall serve his answer within 20 days after the service of notice upon him." Part (a) of the same Rule makes the other rules of civil procedure applicable to condemnation actions "except as otherwise provided in this rule." The question, therefore, is whether the 20-day period is absolute, giving the district court no authority to extend it in cases of excusable neglect, or whether the excusable neglect provisions of Rules 6(b)(2) and 60(b)(1) confer such discretion.

District Courts have held that Rule 6(b) is not applicable to mitigate the time bar of Rule 71A(e), *United States* v. *7.724 Acres of Land*, E.D. La., 1962, 31 F.R.D. 290, but that Rule 60(b) is so applicable, *United States* v. *140.80 Acres of Land*, E.D. La., 1963, 32 F.R.D. 11, 14, *United States* v. *1.108 Acres of Land*, E.D. N.Y., 1960, 25 F.R.D. 205, see also *City of Davenport* v. *Three-*
[fol. 93] *Fifths of an Acre of Land*, S.D. Ill., 1957, 157 F. Supp. 794. The language of the rules themselves offers

little guidance. The court below, in concluding that the word "shall" in 71A(e) should be construed to be mandatory, found guidance in the fact that subsection (c)(2) of the rule provides that a defendant "*may* answer as provided in subdivision (e) of this rule," and thought it persuasive that the word "shall" as used in Rule 59(b) has been construed as mandatory. But the inference drawn from use of both "may" and "shall" is unwarranted; if "shall" had been used in subdivision (c)(2), a defendant would be required to file an answer, while if "may" had been used in subdivision (e), in practical terms no due date would apply to the answer other than those provided by other rules. Nor is the fact that the "shall" in Rule 59(b) has been said to be mandatory, see *Hulson* v. *Atchison T. & S.F. Ry.*, 7 Cir., 1961, 289 F.2d 726, conclusive. Rule 6(b) is by its own terms inapplicable to Rule 59(b), while *Hulson* held Rule 60(b) to be applicable to Rule 59(b) upon a showing of "extraordinary circumstances".

A strong case can be made for the proposition that "shall", as used in 71A(e), is permissive. The rule itself contains no language requiring a different conclusion. The Advisory Committee's note to subdivision (e) manifests no intent that the twenty-day limit be absolute—on the contrary, it seems to reflect an intent to cut off pleadings preliminary to the answer, not subsequent to it, and states that "the general standard of pleading is governed by other rules . . . and this subdivision (e) merely prescribes what matters the answer should set forth." Rule 6(b) lists the other rules to which it is inapplicable, without including Rule 71A in that list. And the rules are to be construed in a liberal manner which effectuates their purpose "to secure the just, speedy, and inexpensive determination of every action" (Rule 1); here the Government itself conceded that appellants should be permitted to file a late answer.[1]

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[1] The Government's Memorandum in Opposition to Motion to Amend, while contending that Rule 71A alone was applicable to these proceedings, concluded with:

> "It is the government's view that the affidavit on file in support of the motion does show circumstances which in justice to the defendants should allow them to now file an answer after the twenty days from the service have elapsed."

[fol. 94] But we need not finally decide here whether the rule is mandatory or permissive, for in either case we think the result below was correct. The trial judge held alternatively that, assuming that he had discretion in the matter, he would deny the motion because "the defendants made no attempt to raise the question until after a substantial portion of the property had been transferred to the State of Oregon." Where, as here, the only "excusable neglect (Rule 6(b)) or "mistake, inadvertence, surprise, or excusable neglect" (Rule 60(b)) alleged is the defendant's original attorney's lack of knowledge of possible defenses to the taking, a substantial quantity of the land taken has been reconveyed after the 20-day period has elapsed and before a late answer is attempted to be filed, and the prima facie right to take is as clear as it is here,[2] we think that denial of the motion was within the scope of the district judge's discretion.

II. *Port Site Value.*

In support of its proposition that the port site value of land riparian to navigable water is not required to be paid upon condemnation, the Government relies principally upon *United States* v. *Commodore Park, Inc.*, 1945, 324 U.S. 386; *United States* v. *Twin City Power Co.*, 1956, 350 U.S. 222; and *United States* v. *Virginia Elec. & Power Co.*, 1961, 365 U.S. 624 ("VEPCO"). In *Commodore Park*, land situated on a navigable inlet whose water was kept fresh by tidal flows was rendered less valuable when the government turned the inlet into a "stagnant pool" by dumping dredged material, accumulated in the course of rendering the connecting navigable bay more suitable for military vessels, across the mouth of the inlet. It was held that the resulting loss was noncompensable because "a riparian owner [does not] acquire a unique private right distinct from that held by all others, to have access to and enjoyment of navigable waters and to recover compensation from the government because deprived of that privilege by an authorized governmental

[2] Here almost all of the two tracts involved were actually inundated by the waters of the reservoir created by the John Day Dam.

change in a stream . . . . Whatever market value of riparian lands may be attributable to their closeness to navigable waters does not detract from the government's [fol. 95] 'absolute' power, in the interests of commerce, to make necessary changes in a stream. In short, as against the demands of commerce, an owner of land adjacent to navigable waters, whose fast lands are left uninvaded, has no private riparian rights of access to the waters to do such things as 'fishing and boating and the like', for which rights the government must pay. Riparian rights of access to navigable waters cannot, as against the government's power to control commerce, be bought and sold." 324 U.S. at 390-91.

In *Twin City*, the defendant power company owned land on the banks of a navigable river and on which it intended to build a private power facility, which the government took for the same use. In response to the power company's claim that the power plant site element of value of the land was compensable, it was held that "the flaw . . . is that the landowner here seeks a value *in the flow of the stream*, a value that inheres in the Government's servitude and one that under our decisions the Government can grant or withhold as it chooses . . . . That special location value is due to the flow of the stream . . . and in this case it is the water power that creates the special value, whether the lands are above or below ordinary high water. It is no answer to say that these private owners had interests in the water that were recognized by state law. We deal here with the federal domain, an area which Congress can completely pre-empt, leaving no vested private claims that constitute 'private property' within the meaning of the Fifth Amendment. Location of the lands might under some circumstances give them special value, as our cases have illustrated. But to attach a value of water power to the Savannah River due to location and to enforce that value against the United States would go *contra* to the teaching of [*United States* v. *Chandler-Dunbar Water Power Co.*, 1913, 229 U.S. 53, 69]—'that the running water in a great navigable stream is capable of private ownership is inconceivable.' To require the United States to pay for this water-power value

would be to create private claims in the public domain." 350 U.S. at 226-28. (Emphasis in original.)

Vepco was similar, except that there the government took the power company's easement of flow. It was held that no power site element of value could be awarded. The government here particularly relies on the Court's state-[fol. 96] ment that "Thus, just as the navigational privilege permits the Government to reduce the value of riparian lands by denying the riparian owner access to the stream without compensation for his loss . . . [citations omitted], it also permits the Government to disregard the value arising from this same fact of riparian location in compensating the owner when fast lands are appropriated." 365 U.S. at 629.

We do not find those cases as persuasive as does the Government. *Commodore Park* dealt only with foreclosure of a privilege of access to navigable waters, not with the taking or invasion of all or any part of the defendant's tangible realty. More importantly, that case holds only that the Government may, in the exercise of its power to promote navigation, deny access to navigable waters, not that that access must not be considered when in the course of a condemnation action it is shown to represent a part of the value of the land actually taken or invaded.[3]

The result in *Twin City* proceeded logically from an almost indistinguishable holding in *Chandler-Dunbar*, and absent language to the contrary cannot be said to have departed from the settled principles which are discussed below. Indeed, it expressly acknowledged that location value is compensable in some circumstances, and refrained from disapproval of *Chandler-Dunbar's* award of compensation for a private lock and canal, a use far more closely connected with "navigation" than its use as a port site. *Vepco*, read against its facts, goes no further than *Twin City*.

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[3] Such a holding would necessarily have overruled *United States* v. *Chandler-Dunbar Water Power Co.*, *supra*, in part, as well as *United States* v. *River Rouge Improvement Co.*, 269 U.S. 411 (which cases are discussed below). We find no evidence in any of the three cases discussed above of any such overruling intent, and cannot take upon ourselves what the Supreme Court has refrained from doing.

The Government claims, however, that power site value and port site value are logically indistinguishable because both depend upon proximity of the property involved to navigable water, and that the reference in the cases to the "flow of the stream" does not limit those holdings to flowing streams but rather is merely the result of the fact that those cases were concerned with flowing navigable waters. However persuasive this may be as a matter of logic, other considerations are weightier and are to the contrary. The historical treatment of analogous riparian [fol. 97] location values and the statutory framework within which condemnation and reconveyance occur combine to convince us that port site value should be compensable under the Fifth Amendment.

The foundation of the cases upon which the Government relies is *United States* v. *Chandler-Dunbar Water Power Co.*, 1913, 229 U.S. 53. There the defendant power company owned land upon the bank of St. Mary's River and subsurface land to the middle of the stream on which it had constructed, respectively, a by-pass lock and canal system and a dam for power generation. The United States, in furtherance of its purpose to improve the navigability of the stream, took all of this property. Compensation was denied for the power site value of the land, but granted as to other elements. According to the Court, "riparian owners upon public navigable waters have in addition to the rights common to the public certain rights to the use and enjoyment of the stream which are incident to such ownership of the bank . . . . These additional rights are not dependent upon title to the soil over which the river flows, but are incident to ownership upon the bank. . . . They have also the right of access to deep water, and when not forbidden by public law may construct for this purpose, wharves, docks, and piers in the shallow water of the shore." Id. at 70. Consequently compensation was allowed for the special value of the lock and canal and the land upon which it was situated for such purposes.[4] And as has been noted above, the Court

[4] The government apparently did not object to a particular valuation of another parcel based upon its value "for general wharfage, dock and warehouse purposes, disconnected with development of power in the rapids." *Id.* at 75.

in *Twin City* did not disapprove, much less overrule, this holding. That the principle is of some antiquity is illustrated by *Boom Co.* v. *Patterson*, 1878, 98 U.S. (8 Otto) 403, 408, which held that the location of certain islands in a navigable portion of the Mississippi River, which location gave them a peculiar value for purposes of constructing a log-retaining "boom", was properly an element for consideration in fixing the amount of compensation due the owner upon a taking by a state agency.

United States v. *River Rouge Improvement Co.*, 1926, 269 U.S. 411 (construing 40 Stat. 901, 911, c. 155, § 6, now 33 U.S.C. § 595), establishes another part of this pattern. [fol. 98] There a statute provided that where only a part of a parcel of land was taken for a river improvement project, the resulting award should be reduced by the amount of any direct benefit conferred upon the remaining land by the project. The trial court's overemphasis upon the government's continuing right to cut off the privilege of access to navigable water in the exercise of its overriding navigation servitude—which resulted in unduly reducing the "direct benefit" offset to the compensation award—was held error. "[A]n increase in the value of the remaining portion of any parcel of land caused by its frontage on the widened river, carrying a right of immediate access to and use of the improved stream, would constitute a special and direct benefit within the meaning of the statute. . . ." Moreover, "it is well settled that in the absence of a controlling local law otherwise limiting the rights of a riparian owner upon a navigable river, ... [citation omitted] he has, in addition to the rights common to the public, a property right, incident to his ownership of the bank, of access from the front of his land to the navigable part of the stream, and when not forbidden by public law may construct landings, wharves or piers for this purpose . . . . [Citations omitted.]" Id. at 415. 417-18. The Court went on to note that these riparian rights are subject to the government's navigation servitude, but concluded that the mere existence of the government's power to reduce the value of riparian rights could not justify present valuation of them at a nominal amount; rather, they are to be valued in the light of a realistic estimate of the chance that the government will

in fact exercise its servitude. This is directly contrary to the position which the Government takes in the case before us, but we think that the principles announced in this and other cases discussed above are still good law and find no intimation otherwise in the more recent pronouncements of the Supreme Court.

We also find support for this conclusion in the approach which Congress has taken to the problems inherent in condemnation for river development purposes. 33 U.S.C. § 595, whose predecessor was construed in *River Rouge, supra*, still provides that where only a part of a parcel of land is taken for a river development project, "the jury or other tribunal awarding the just compensation . . . shall take into consideration by way of reducing the amount of compensation or damages any special and direct [fol. 99] benefits to the remainder arising from the improvement . . . ." Now the government argues that where all of the land is taken, that element of its value attributable to its riparian location cannot be taken into account in computing its value. This is a fundamental and inequitable inconsistency, designed to give the government the best of both worlds. But if it is fair to allow compensation to be reduced by resulting benefit to retained property, then fairness dictates that the additional value of property taken, attributable to the same source (here, riparian location), should be paid for.

The inconsistency and the unfairness of the government's position are cast into sharper relief by 33 U.S.C. § 578. That section allows the Secretary of the Army to sell excess land for port and industrial purposes to the states or state-created agencies upon his determination that such development "on land which is part of a water resource development project under his jurisdiction will be in the public interest; (2) that such development will not interfere with the operation and maintenance of the project; and (3) that disposition of the property for these purposes under this section will serve the objectives of the project within which the land is located . . . ." It requires that any such sale be at "the fair market value of the land." Here just such a sale was made by the United States to the State of Oregon. Assuming that port site

value is an element of fair market value as that phrase is used in this statute—and we think that, absent any contrary indication in the statute, it must be so understood—then the principles of *Monongahela Nav. Co.* v. *United States*, 1893, 148 U.S. 312, 337-38, are applicable. There the government took a dam and associated lock and canal, passage through which was subject, under a franchise, to payment of a toll to the owner of the project. "After taking this property, the Government will have the right to exact the same toll the Navigation Company has been receiving. It would seem strange that, if by asserting its right to take the property, the Government could strip it largely of its value, destroying all that value which comes from the receipt of tolls, and having taken the property at this reduced valuation, immediately possess and enjoy all the profits from the collection of the same tolls. In other words, by the contention this element of value exists before and after the taking, and disappears only during the very moment and process of taking. [fol. 100] Surely, reasoning which leads to such a result must have some vice, at least the vice of injustice."

Further support exists in the Submerged Lands Act, 43 U.S.C. §§ 1301-1343. That act, throughout its text and legislative history, see 1953 U.S. Code Cong. & Ad. News, 1385-1640, reflects the concern of Congress that any ownership it might assert over lands beneath navigable waters not impede economic development in the States. See *e.g.*, 15 U.S. Code Cong. & Ad. News, 1479-81, 1525. Where Congress sought to confirm ownership of natural resources in the states, and through them, private persons, yet reserve certain rights to itself, it reserved only those rights which *Chandler-Dunbar* held were vested in the national government in the form of an overriding navigational servitude; 43 U.S.C. § 1301(e) defines the term "natural resources". "without limiting the generality thereof," by listing certain of such resources, then concludes with a statement that the term "does not include water power, or the use of water for the production of power," which is the resource reserved to the United States. Section 1314(a) explicitly reserves to the United States "all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for

the constitutional purposes of commerce, navigation, national defense, and international affairs, *all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of* management, administration, leasing, *use, and development of the lands* and natural resources wihch are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others . . . ." (Emphasis added.)

To uphold the stand taken by the Government here would, we think, subvert this policy by inhibiting development of riparian property where the riparian nature of that property contributes significantly to its value and there is a reasonable possibility that it may at some time be taken by the Government for its own use in some navigation-connected project. And this, under our reading of the existing law and in the face of a statutory scheme which should be read to provide fair treatment, we cannot do.[5]

[fol. 101] Here the land obviously had value as a port site. It had historically been so used, and appellants had granted the state of Oregon an option to purchase it for almost three times the apparent market price of contiguous, non-port site property. At trial, appellants made an offer of proof that the land was worth at least $50,000. They should be given a chance to prove their claims.

Reversed and remanded for a new trial on the issue of just compensation.

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[5] The courts of New York have reached the same result in *Andrews* v. *State*, Ct. Cl., 1959, 19 Misc. 217, 188 N.Y.S.2d 854, aff'd, 1960, 11 App.Div.2d 599, 200 N.Y.S.2d 451, aff'd, 1961, 9 N.Y.2d 606, 176 N.E.2d 42, *cert. denied*, 1961, 368 U.S. 929.

[fol. 102]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20,280

R. B. RANDS, ET UX., APPELLANTS

vs.

UNITED STATES OF AMERICA, APPELLEE

JUDGMENT—Filed and entered October 7, 1966

APPEAL from the United States District Court for the District of Oregon.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and that this cause be and hereby is remanded to the said District Court for a new trial on the issue of just compensation.

[fol. 103]

[Clerk's Certificate to foregoing transcript omitted in printing]

[fol. 104]

SUPREME COURT OF THE UNITED STATES

No. ——, October Term, 1966

UNITED STATES, PETITIONER

vs.

R. B. RANDS, ET UX.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—January 9, 1967

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including Feb. 4, 1967.

/s/ Wm. O. Douglas
Associate Justice of the Supreme
Court of the United States

Dated this 9th
day of January, 1967.

[fol. 105]

SUPREME COURT OF THE UNITED STATES

No. ——, October Term, 1966

UNITED STATES, PETITIONER

vs.

R. B. RANDS, ET UX.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—February 2, 1967

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, further extended to and including February 20, 1967.

/s/ William J. Brennan, Jr.
Associate Justice of the Supreme
Court of the United States

Dated this 2
day of February, 1967

[fol. 106]

SUPREME COURT OF THE UNITED STATES

No. 1083, October Term, 1966

UNITED STATES, PETITIONER

v.

R. B. RANDS, ET UX.

ORDER ALLOWING CERTIORARI—April 10, 1967

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967 261263 832

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No.

UNITED STATES OF AMERICA, PETITIONER

v.

R. B. RANDS, ET UX.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The district court's memorandum opinion of October 12, 1964 (R. 38-39) is unreported. The district court's earlier opinion denying respondents' motion to amend their notice of appearance (R. 35-37) is reported at 224 F. Supp. 305. The opinion of the court

of appeals (App. A, *infra*, pp. 1a-16a) is reported at 367 F. 2d 186.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 17a) was entered on October 7, 1966. By orders of January 9 and February 2, 1967, the time for filing a petition for a writ of certiorari was extended to and including February 20, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, when the United States condemns land bordering a navigable stream for a river improvement, the condemnee is entitled to receive (as just compensation for private property taken) a special increment based upon the value the land may have as a potential port site.

STATEMENT

Respondents owned two tracts of land riparian to the Columbia River,[1] which the government condemned in connection with the John Day Lock and Dam Project. The stated purposes of the project were flood control, river improvement and hydroelectric development.[2] Upon trial of the issue of just compen-

[1] Tract 2403, containing 121 acres, and Tract 2514, containing 139 acres (R. 5, 41).

[2] River and Harbor Act of 1950, 64 Stat. 163, 179; see H. Doc. No. 531, 81st Cong., 2d Sess., p. 282, *et seq.*

sation for Tract 2514, the jury found its fair value to be $7,000 (R. 66); the parties, by stipulation, then fixed compensation for Tract 2403 at $2,420 (R. 67).

At trial, respondents' witnesses based their opinions of value on use of the land for sand and gravel and agricultural purposes, and the opinions of the government's witnesses were based on agricultural value alone (R. 41). Respondents sought to show, in addition, that their land was valuable as a potential port site and submitted an offer of proof as to the amount of such value (R. 42). The trial court held, however, that the land's potential port-site value was not a proper element of just compensation. In a memorandum opinion filed October 12, 1964, the court reasoned as follows (R. 38-39):

> I am unable to distinguish between the value of land as a site for hydroelectric power purposes, the issue before the court in *United States* v. *Twin City Power Co.*, 350 U.S. 222 (1955), and the value of land as a site for port operations. The successful operation of each depends on the flow of the stream. A port without water is no more susceptible to successful operation than would be a hydroelectric plant without its source of power. It is my belief that the value, if any, for port purposes is subject to the overriding navigational [servitude] of the United States, which permits the appropriation of any such a property right by the United States without compensation. * * *

On appeal, the court of appeals reversed, holding that riparian lands' potential port-site value should be included in just compensation, calculated "in the

light of a realistic estimate of the chance that the government will in fact exercise its servitude" (App. A, *infra*, p. 12a).[3]

REASONS FOR GRANTING THE WRIT

The decision below, holding that the government must pay a riparian landowner for the value of his condemned land as a potential port site—an increment of value arising from and dependent upon the navigational potential of the stream along which the land is located—is in conflict with this Court's recent decisions in *United States* v. *Twin City Power Co.*, 350 U.S. 222, and *United States* v. *Virginia Electric & Power Co.*, 365 U.S. 624. If allowed to stand, the Ninth Circuit's decision will have a direct impact on federal projects involving the great river basins of the West and, by engendering confusion as to the scope of the federal commerce power, is likely to affect the cost of federal river projects in other parts of the country.

1. Both *Twin City* and *Virginia Electric* held that the value of riparian uplands as a potential hydroelectric power site is not an element of just com-

[3] More than six weeks after being served with the complaint respondents sought to contest the government's right to take their land by means of a motion to amend their previously filed notice of appearance (R. 31-34). The trial court denied the motion on October 16, 1963, on the ground that it was untimely under Rule 71A(e), Fed. R. Civ. P. (R. 35-37). On appeal, the court of appeals held that, even assuming the time limit in Rule 71A(e) is not mandatory, the district court did not abuse its discretion in denying respondents' motion.

pensation payable upon condemnation by the federal government. The rationale of this ruling was clearly expressed in *Twin City*, 350 U.S. at 224-225, as follows:

> The interest of the United States in the flow of a navigable stream originates in the Commerce Clause. * * * [That interest] is a dominant one which can be asserted to the exclusion of any competing or conflicting one. * * *
>
> * * * *
>
> * * * [Thus no landowner may claim] a value *in the flow of the stream*, a value that inheres in the Government's servitude and one that under our decisions the Government can grant or withhold as it chooses. * * *

And in *Virginia Electric*, 365 U.S. at 627-629, the Court reiterated these principles:

> This navigational servitude * * * is the privilege to appropriate without compensation which attaches to the exercise of the "power of the government to control and regulate navigable waters in the interest of commerce." * * *
>
> * * * *
>
> * * * Thus, just as the navigational privilege permits the Government to reduce the value of riparian lands by denying the riparian owner access to the stream without compensation for his loss, * * * it also permits the Government to disregard the value arising from this same fact of riparian location in compensating the owner when fast lands are appropriated.

As the district court properly held, these principles are applicable here. The port-site value sought by

respondents, like power-site value, inheres in the flow of the stream on which their land borders. Indeed, it is that very quality of the stream in which the paramount governmental interest is historically best established — *i.a.*, its navigability — which underlies whatever value the adjacent lands may have as port sites. Moreover, like the appropriation of that flow for private power purposes (16 U.S.C. 797(e)), the private utilization of a navigable stream for the operation of port facilities is contingent upon the issuance and continuing effectiveness of a federal license. Act of March 3, 1899, Section 10, 30 Stat. 1151, 33 U.S.C. 403. Thus, like water-power value, port-site value depends upon a privilege "that the Government in the exercise of its dominant servitude can grant or withhold as it chooses." *Twin City*, 350 U.S. at 228; cf. *United States* v. *Grand River Dam Authority*, 363 U.S. 229.

The mere physical adaptability of condemned land to certain uses does not determine the extent of compensable value. Just compensation involves only the condemnee's loss, not the condemnor's gain. *Olson* v. *United States*, 292 U.S. 246, 256, 261;[4] *Shoemaker* v. *United States*, 147 U.S. 282, 305. Note, *Power Site Value in Eminent Domain Proceedings: A New Toll Charge for Water Resource Development*, 65

[4] In *Olson*, this Court held that the potential value of land bordering a Minnesota lake for reservoir purposes was not compensable. This ruling was based on the fact that only the government, and not the condemnee, "as a legal and practical possibility * * * could have acquired the right to flow the lands necessary" for the creation of a reservoir. 292 U.S. at 260.

Yale L.J. 96 (1955). Where, as here, the use claimed for the land taken arises from the adjacent river's navigability—in which no private ownership rights may exist—and is entirely dependent, both for its inception and its continuation, upon governmental authorization, the taking does not result in a compensable loss to the landowner.[5] As this Court concluded in *Twin City*, 350 U.S. at 228, "What the Government can grant or withhold and exploit for its own benefit has a value that is peculiar to it and that no other user enjoys. * * * To require the United States to pay for this * * * value would be to create private claims in the public domain." That is precisely the effect of the decision below.

2. The court of appeals declined to follow the *Twin City* and *Virginia Electric* rationale because it found "other considerations" more persuasive (App. A, *infra*, p. 9a). As we briefly show, none of these considerations justifies the result reached below.

The court below placed primary reliance on that part of the decision in *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, holding the value of condemned land for lock-and-canal purposes compensable. But whatever the validity of that ruling, which involved a diversion of the waterway from its natural bed and thus, arguably, an independent use of the land, it should not be applied where, as here, the

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[5] Even if the government's action may be said to have resulted in the frustration of respondents' business plans or expectations—and it is far from clear that this was the case—no right to compensation would arise from such frustration. *United States* v. *Grand River Dam Authority*, 363 U.S. 229, 236.

allegedly compensable use is directly attendant to the natural flow of the stream. As this Court indicated in *Twin City*, the lock-and-canal holding of *Chandler-Dunbar* should properly be confined to "the special facts of the case" (350 U.S. at 226, fn.). To the extent that *Chandler-Dunbar* may be inconsistent with this Court's subsequent decisions, the more recent rulings are, of course, controlling.

The court of appeals also relied—improperly, we submit—on the fact that, after the project was developed, the government conveyed excess lands to the State of Oregon for port purposes,* presumably at their then current value. This transaction is wholly irrelevant to the issue involved here. In calculating just compensation, no account should be taken of special uses available only to the government or its successors or of the value of the property *after* the taking. See *United States* v. *Miller*, 317 U.S. 369; *United States* v. *Cors*, 337 U.S. 325. Thus, in the *Twin City* situation, the fact that, after the taking, the government might have been able to obtain power-site value for the land taken did not justify awarding that value to the landowner prior to the project. The same is true here.

Similarly misplaced is the court of appeals' reliance on the rule (*United States* v. *River Rouge Co.*, 269 U.S. 411; Rivers and Harbors Appropriation Act of 1918, Section 6, 40 Stat. 911, 33 U.S.C. 595) that, when only a portion of one's land is taken for river improvement, the compensation due the landowner is

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* The conveyance was made under the terms of the Act of July 14, 1960, Section 108, 74 Stat. 486, 33 U.S.C. 578.

reduced by the amount the remaining land is enhanced in value as a result of the project. This rule is merely the corollary of the principle that the condemnee is not entitled to any value resulting from the expropriation itself. See *United States* v. *Miller*, *supra*. It surely does not follow, as the court below believed (App. A, *infra*, pp. 12a-13a), that the exclusion from compensation of "any special and direct benefits to the remainder *arising from the improvement*" (*ibid.*, emphasis supplied) requires payment, in the first instance, for value attributable to riparian location.[7]

3. The decision below gives too narrow a scope to the government's navigational servitude and accords this Court's recent decisions an unduly restrictive reading. If allowed to stand, it will assuredly foster uncertainty in an important area of federal law; it is likely to result in windfalls to riparian landowners from the public Treasury and might encourage speculation in riparian properties. Within the Ninth Circuit, the decision will directly affect the result in a number of pending cases[8] and may also bear on the

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[7] The court below also relied on Sections 2(e) and 6 of the Submerged Lands Act, 67 Stat. 29, 30, 32, 43 U.S.C. 1301(e), 1314. It is manifestly apparent, however, that Congress intended no dilution of the government's navigational servitude in that Act. Furthermore, the Act concerned only submerged lands within the marginal sea. See *United States* v. *Louisiana*, 363 U.S. 1, 16-20; *United States* v. *California*, 381 U.S. 139, 150-160. The project involved here is 217 miles above the mouth of the Columbia River. H. Doc. No. 531, 81st Cong., 2d Sess., p. 282.

[8] *Robert C. Smith, et ux.* v. *United States*, No. 20787 (C.A. 9); *Mid-Columbia Storage & Terminal Co.* v. *United States*,

disposition of some $10,000,000 of pending claims[9] which, although arising in a distinguishable context, depend upon a conclusion as to the nature of the navigational servitude. And, since federal projects in aid of navigation reach into every region of the country, the ramifications of the decision below will undoubtedly not be confined to the Ninth Circuit.

CONCLUSION

For the reasons stated above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

EDWIN L. WEISL, JR.,
Assistant Attorney General.

JEROME I. CHAPMAN,
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ROGER P. MARQUIS,
A. DONALD MILEUR,
Attorneys.

FEBRUARY 1967.

No. 20536 (C.A. 9); *United States* v. *Pendleton Grain Growers, Inc.*, No. 65-303 (D. Ore.).

[9] *United States* v. *9,103.87 Acres in Clearwater County, Idaho (Potlatch Forests, Inc.)*, Civ. 3-66-11 (D. Idaho).

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 20,280

R. B. RANDS, ET UX., APPELLANTS

vs.

UNITED STATES OF AMERICA, APPELLEE

[October 7, 1966]

Appeal from the United States District Court for the District of Oregon.

Before: BARNES, KOELSCH and DUNIWAY, Circuit Judges

DUNIWAY, Circuit Judge:

Appellants owned two tracts of land along the Columbia River, about six miles upstream from the present John Day Dam. On November 1, 1962, they leased this and other property to the state of Oregon, which wanted it for an industrial park. That industrial development, for maximum utility, required access to the Columbia River; because two railroads

and the United States owned most of the land along the river, appellants' property was especially valuable as a port site. The lease agreement gave Oregon an option to purchase the land. Most of the land was priced, under the option, at $150 per acre; the balance, denominated "port site property" in the agreement, was priced at $400 per acre.

The option was never exercised. On August 13, 1963, the United States filed a Declaration of Taking in the United States District Court, condemning this and other property in connection with the river development project of which the John Day Dam is a part. On September 25, 1963, the Secretary of the Army granted this and other land to the state of Oregon by a federal deed. Its use passed to a private corporation under a lease from the state of Oregon dated July 2, 1963. The record does not show and we are not told how much of the sale price or rents paid for the whole block of land involved are attributable to the two tracts in suit.

In response to the notice of taking, appellants filed a notice of appearance on September 3, 1963, contesting the amount of proposed compensation and requesting partial distribution of funds. On September 27 they filed a motion requesting permission to call their earlier appearance an answer and to amend it to raise defenses to the taking of their property. They assign as error the district court's refusal, under Rule 71A, F. R. Civ. P., to permit variance, under the excusable neglect provisions of Rules 6(b) and 60(b), from the requirement of Rule 71A that objections to the taking itself be filed within 20 days

from service of the notice of taking. Upon trial of the compensation issue, the district court held, relying on *United States* v. *Twin City Power Co.*, 1956, 350 U.S. 222, and *United States* v. *Virginia Elec. & Power Co.*, 1961, 365 U.S. 624, that that element of value of the land arising from its utility as a port site is non-compensable under the Fifth Amendment. Appellants say that that holding too is erroneous.

I. *Late Amendment under Rule 71A, F.R.Civ.P.*

Rule 71A(e) provides that "If a defendant has any objection or defense to the taking of his property, he shall serve his answer within 20 days after the service of notice upon him." Part (a) of the same Rule makes the other rules of civil procedure applicable to condemnation actions "except as otherwise provided in this rule." The question, therefore, is whether the 20-day period is absolute, giving the district court no authority to extend it in cases of excusable neglect, or whether the excusable neglect provisions of Rules 6(b)(2) and 60(b)(1) confer such discretion.

District Courts have held that Rule 6(b) is not applicable to mitigate the time bar of Rule 71A(e), *United States* v. *7.724 Acres of Land*, E.D. La., 1962, 31 F.R.D. 290, but that Rule 60(b) is so applicable, *United States* v. *140.80 Acres of Land*, E.D. La., 1963, 32 F.R.D. 11, 14, *United States* v. *1.108 Acres of Land*, E.D. N.Y., 1960, 25 F.R.D. 205, see also *City of Davenport* v. *Three-Fifths of an Acre of Land*, S.D. Ill., 1957, 157 F. Supp. 794. The language of the rules themselves offers little guidance. The court be-

low, in concluding that the word "shall" in 71A(e) should be construed to be mandatory, found guidance in the fact that subsection (c)(2) of the rule provides that a defendant "*may* answer as provided in subdivision (e) of this rule," and thought it persuasive that the word "shall" as used in Rule 59(b) has been construed as mandatory. But the inference drawn from use of both "may" and "shall" is unwarranted; if "shall" had been used in subdivision (c)(2), a defendant would be required to file an answer, while if "may" had been used in subdivision (e), in practical terms no due date would apply to the answer other than those provided by other rules. Nor is the fact that the "shall" in Rule 59(b) has been said to be mandatory, see *Hulson* v. *Atchison T. & S.F. Ry.*, 7 Cir., 1961, 289 F.2d 726, conclusive. Rule 6(b) is by its own terms inapplicable to Rule 59(b), while *Hulson* held Rule 60(b) to be applicable to Rule 59(b) upon a showing of "extraordinary circumstances".

A strong case can be made for the proposition that "shall", as used in 71A(e), is permissive. The rule itself contains no language requiring a different conclusion. The Advisory Committee's note to subdivision (e) manifests no intent that the twenty-day limit be absolute—on the contrary, it seems to reflect an intent to cut off pleadings preliminary to the answer, not subsequent to it, and states that "the general standard of pleading is governed by other rules . . . and this subdivision (e) merely prescribes what matters the answer should set forth." Rule 6(b) lists the other rules to which it is inapplicable, without includ-

ing Rule 71A in that list. And the rules are to be construed in a liberal manner which effectuates their purpose "to secure the just, speedy, and inexpensive determination of every action" (Rule 1); here the Government itself conceded that appellants should be permitted to file a late answer.[1]

But we need not finally decide here whether the rule is mandatory or permissive, for in either case we think the result below was correct. The trial judge held alternatively that, assuming that he had discretion in the matter, he would deny the motion because "the defendants made no attempt to raise the question until after a substantial portion of the property had been transferred to the State of Oregon." Where, as here, the only "excusable neglect (Rule 6(b)) or "mistake, inadvertence, surprise, or excusable neglect" (Rule 60(b)) alleged is the defendant's original attorney's lack of knowledge of possible defenses to the taking, a substantial quantity of the land taken has been reconveyed after the 20-day period has elapsed and before a late answer is attempted to be filed, and the prima facie right to take is as clear as it is here,[2]

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[1] The Government's Memorandum in Opposition to Motion to Amend, while contending that Rule 71A alone was applicable to these proceedings, concluded with:

> "It is the government's view that the affidavit on file in support of the motion does show circumstances which in justice to the defendants should allow them to now file an answer after the twenty days from the service have elapsed."

[2] Here almost all of the two tracts involved were actually inundated by the waters of the reservoir created by the John Day Dam.

we think that denial of the motion was within the scope of the district judge's discretion.

II. *Port Site Value.*

In support of its proposition that the port site value of land riparian to navigable water is not required to be paid upon condemnation, the Government relies principally upon *United States* v. *Commodore Park, Inc.*, 1945, 324 U.S. 386; *United States* v. *Twin City Power Co.*, 1956, 350 U.S. 222; and *United States* v. *Virginia Elec. & Power Co.*, 1961, 365 U.S. 624 ("VEPCO"). In *Commodore Park*, land situated on a navigable inlet whose water was kept fresh by tidal flows was rendered less valuable when the government turned the inlet into a "stagnant pool" by dumping dredged material, accumulated in the course of rendering the connecting navigable bay more suitable for military vessels, across the mouth of the inlet. It was held that the resulting loss was noncompensable because "a riparian owner [does not] acquire a unique private right distinct from that held by all others, to have access to and enjoyment of navigable waters and to recover compensation from the government because deprived of that privilege by an authorized governmental change in a stream . . . . Whatever market value of riparian lands may be attributable to their closeness to navigable waters does not detract from the government's 'absolute' power, in the interests of commerce, to make necessary changes in a stream. In short, as against the demands of commerce, an owner of land adjacent to navigable

waters, whose fast lands are left uninvaded, has no private riparian rights of access to the waters to do such things as 'fishing and boating and the like', for which rights the government must pay. Riparian rights of access to navigable waters cannot, as against the government's power to control commerce, be bought and sold." 324 U.S. at 390-91.

In *Twin City*, the defendant power company owned land on the banks of a navigable river and on which it intended to build a private power facility, which the government took for the same use. In response to the power company's claim that the power plant site element of value of the land was compensable, it was held that "the flaw . . . is that the landowner here seeks a value *in the flow of the stream*, a value that inheres in the Government's servitude and one that under our decisions the Government can grant or withhold as it chooses . . . . That special location value is due to the flow of the stream . . . and in this case it is the water power that creates the special value, whether the lands are above or below ordinary high water. It is no answer to say that these private owners had interests in the water that were recognized by state law. We deal here with the federal domain, an area which Congress can completely pre-empt, leaving no vested private claims that constitute 'private property' within the meaning of the Fifth Amendment. Location of the lands might under some circumstances give them special value, as our cases have illustrated. But to attach a value of water power to the Savannah River due to location and to enforce

that value against the United States would go *contra* to the teaching of [*United States* v. *Chandler-Dunbar Water Power Co.*, 1913, 229 U.S. 58, 69]—'that the running water in a great navigable stream is capable of private ownership is inconceivable.' To require the United States to pay for this water-power value would be to create private claims in the public domain." 350 U.S. at 226-28. (Emphasis in original.)

Vepco was similar, except that there the government took the power company's easement of flow. It was held that no power site element of value could be awarded. The government here particularly relies on the Court's statement that "Thus, just as the navigational privilege permits the Government to reduce the value of riparian lands by denying the riparian owner access to the stream without compensation for his loss . . . [citations omitted], it also permits the Government to disregard the value arising from this same fact of riparian location in compensating the owner when fast lands are appropriated." 365 U.S. at 629.

We do not find those cases as persuasive as does the Government. *Commodore Park* dealt only with foreclosure of a privilege of access to navigable waters, not with the taking or invasion of all or any part of the defendant's tangible realty. More importantly, that case holds only that the Government may, in the exercise of its power to promote navigation, deny access to navigable waters, not that that access must not be considered when in the course of a condemnation

action it is shown to represent a part of the value of the land actually taken or invaded.[3]

The result in *Twin City* proceeded logically from an almost indistinguishable holding in *Chandler-Dunbar*, and absent language to the contrary cannot be said to have departed from the settled principles which are discussed below. Indeed, it expressly acknowledged that location value is compensable in some circumstances, and refrained from disapproval of *Chandler-Dunbar's* award of compensation for a private lock and canal, a use far more closely connected with "navigation" than its use as a port site. *Vepco*, read against its facts, goes no further than *Twin City*.

The Government claims, however, that power site value and port site value are logically indistinguishable because both depend upon proximity of the property involved to navigable water, and that the reference in the cases to the "flow of the stream" does not limit those holdings to flowing streams but rather is merely the result of the fact that those cases were concerned with flowing navigable waters. However persuasive this may be as a matter of logic, other considerations are weightier and are to the contrary. The historical treatment of analogous riparian location values and the statutory framework within which

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[3] Such a holding would necessarily have overruled *United States* v. *Chandler-Dunbar Water Power Co., supra*, in part, as well as *United States* v. *River Rouge Improvement Co.*, 269 U.S. 411 (which cases are discussed below). We find no evidence in any of the three cases discussed above of any such overruling intent, and cannot take upon ourselves what the Supreme Court has refrained from doing.

condemnation and reconveyance occur combine to convince us that port site value should be compensable under the Fifth Amendment.

The foundation of the cases upon which the Government relies is *United States* v. *Chandler-Dunbar Water Power Co.*, 1913, 229 U.S. 53. There the defendant power company owned land upon the bank of St. Mary's River and subsurface land to the middle of the stream on which it had constructed, respectively, a by-pass lock and canal system and a dam for power generation. The United States, in furtherance of its purpose to improve the navigability of the stream, took all of this property. Compensation was denied for the power site value of the land, but granted as to other elements. According to the Court, "riparian owners upon public navigable waters have in addition to the rights common to the public certain rights to the use and enjoyment of the stream which are incident to such ownership of the bank . . . . These additional rights are not dependent upon title to the soil over which the river flows, but are incident to ownership upon the bank. . . . They have also the right of access to deep water, and when not forbidden by public law may construct for this purpose, wharves, docks, and piers in the shallow water of the shore." Id. at 70. Consequently compensation was allowed for the special value of the lock and canal and the land upon which it was situated for such purposes.[4] And as has been noted above, the Court in

[4] The government apparently did not object to a particular valuation of another parcel based upon its value "for general

Twin City did not disapprove, much less overrule, this holding. That the principle is of some antiquity is illustrated by *Boom Co.* v. *Patterson*, 1878, 98 U.S. (8 Otto) 403, 408, which held that the location of certain islands in a navigable portion of the Mississippi River, which location gave them a peculiar value for purposes of constructing a log-retaining "boom", was properly an element for consideration in fixing the amount of compensation due the owner upon a taking by a state agency.

United States v. *River Rouge Improvement Co.*, 1926, 269 U.S. 411 (construing 40 Stat. 901, 911, c. 155, § 6, now 33 U.S.C. § 595), establishes another part of this pattern. There a statute provided that where only a part of a parcel of land was taken for a river improvement project, the resulting award should be reduced by the amount of any direct benefit conferred upon the remaining land by the project. The trial court's overemphasis upon the government's continuing right to cut off the privilege of access to navigable water in the exercise of its overriding navigation servitude—which resulted in unduly reducing the "direct benefit" offset to the compensation award—was held error. "[A]n increase in the value of the remaining portion of any parcel of land caused by its frontage on the widened river, carrying a right of immediate access to and use of the improved stream, would constitute a special and direct benefit within the meaning of the statute. . . ." Moreover, "it is well

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wharfage, dock and warehouse purposes, disconnected with development of power in the rapids." *Id.* at 75.

settled that in the absence of a controlling local law otherwise limiting the rights of a riparian owner upon a navigable river, ... [citation omitted] he has, in addition to the rights common to the public, a property right, incident to his ownership of the bank, of access from the front of his land to the navigable part of the stream, and when not forbidden by public law may construct landings, wharves or piers for this purpose . . . . [Citations omitted.]" Id. at 415, 417-18. The Court went on to note that these riparian rights are subject to the government's navigation servitude, but concluded that the mere existence of the government's power to reduce the value of riparian rights could not justify present valuation of them at a nominal amount; rather, they are to be valued in the light of a realistic estimate of the chance that the government will in fact exercise its servitude. This is directly contrary to the position which the Government takes in the case before us, but we think that the principles announced in this and other cases discussed above are still good law and find no intimation otherwise in the more recent pronouncements of the Supreme Court.

We also find support for this conclusion in the approach which Congress has taken to the problems inherent in condemnation for river development purposes. 33 U.S.C. § 595, whose predecessor was construed in *River Rouge, supra,* still provides that where only a part of a parcel of land is taken for a river development project, "the jury or other tribunal awarding the just compensation . . . shall take into

consideration by way of reducing the amount of compensation or damages any special and direct benefits to the remainder arising from the improvement . . . ." Now the government argues that where all of the land is taken, that element of its value attributable to its riparian location cannot be taken into account in computing its value. This is a fundamental and inequitable inconsistency, designed to give the government the best of both worlds. But if it is fair to allow compensation to be reduced by resulting benefit to retained property, then fairness dictates that the additional value of property taken, attributable to the same source (here, riparian location), should be paid for.

The inconsistency and the unfairness of the government's position are cast into sharper relief by 33 U.S.C. § 578. That section allows the Secretary of the Army to sell excess land for port and industrial purposes to the states or state-created agencies upon his determination that such development "on land which is part of a water resource development project under his jurisdiction will be in the public interest; (2) that such development will not interfere with the operation and maintenance of the project; and (3) that disposition of the property for these purposes under this section will serve the objectives of the project within which the land is located . . . ." It requires that any such sale be at "the fair market value of the land." Here just such a sale was made by the United States to the State of Oregon. Assuming that port site value is an element of fair market value

as that phrase is used in this statute—and we think that, absent any contrary indication in the statute, it must be so understood—then the principles of *Monongahela Nav. Co.* v. *United States*, 1893, 148 U.S. 312, 337-38, are applicable. There the government took a dam and associated lock and canal, passage through which was subject, under a franchise, to payment of a toll to the owner of the project. "After taking this property, the Government will have the right to exact the same toll the Navigation Company has been receiving. It would seem strange that, if by asserting its right to take the property, the Government could strip it largely of its value, destroying all that value which comes from the receipt of tolls, and having taken the property at this reduced valuation, immediately possess and enjoy all the profits from the collection of the same tolls. In other words, by the contention this element of value exists before and after the taking, and disappears only during the very moment and process of taking. Surely, reasoning which leads to such a result must have some vice, at least the vice of injustice."

Further support exists in the Submerged Lands Act, 43 U.S.C. §§ 1301-1343. That act, throughout its text and legislative history, see 1953 U.S. Code Cong. & Ad. News, 1385-1640, reflects the concern of Congress that any ownership it might assert over lands beneath navigable waters not impede economic development in the States. See *e.g.*, 15 U.S. Code Cong. & Ad. News, 1479-81, 1525. Where Congress sought to confirm ownership of natural resources in

the states, and through them, private persons, yet reserve certain rights to itself, it reserved only those rights which *Chandler-Dunbar* held were vested in the national government in the form of an overriding navigational servitude; 43 U.S.C. § 1301(e) defines the term "natural resources", "without limiting the generality thereof," by listing certain of such resources, then concludes with a statement that the term "does not include water power, or the use of water for the production of power," which is the resource reserved to the United States. Section 1314(a) explicitly reserves to the United States "all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, *all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of* management, administration, leasing, *use, and development of the lands* and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others . . . ." (Emphasis added.)

To uphold the stand taken by the Government here would, we think, subvert this policy by inhibiting development of riparian property where the riparian nature of that property contributes significantly to its value and there is a reasonable possibility that it may at some time be taken by the Government for its own use in some navigation-connected project. And this, under our reading of the existing law and

in the face of a statutory scheme which should be read to provide fair treatment, we cannot do.[5]

Here the land obviously had value as a port site. It had historically been so used, and appellants had granted the state of Oregon an option to purchase it for almost three times the apparent market price of contiguous, non-port site property. At trial, appellants made an offer of proof that the land was worth at least $50,000. They should be given a chance to prove their claims.

Reversed and remanded for a new trial on the issue of just compensation.

---

[5] The courts of New York have reached the same result in *Andrews* v. *State*, Ct. Cl., 1959, 19 Misc. 217, 188 N.Y.S.2d 854, aff'd, 1960, 11 App.Div.2d 599, 200 N.Y.S.2d 451, aff'd, 1961, 9 N.Y.2d 606, 176 N.E.2d 42, *cert. denied*, 1961, 368 U.S. 929.

APPENDIX B

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20,280

R. B. RANDS, et ux., APPELLANTS

vs.

UNITED STATES OF AMERICA, APPELLEE

APPEAL from the United States District Court for the District of Oregon.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the ..... judgment of the said District Court in this Cause be, and hereby is reversed and that this cause be and hereby is remanded to the said District Court for a new trial on the issue of just compensation.

Filed and entered October 7, 1966

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In the Supreme Court of the United States

OCTOBER TERM, 1960

UNITED STATES OF AMERICA,

Petitioner,

v.

R. B. RANDS, et ux.

Respondents.

On Writ of Certiorari to the United States Court Of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENT

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In the Supreme Court of the United States

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UNITED STATES OF AMERICA,

Petitioner,

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R. B. RANDS, et ux.

Respondents.

On Writ of Certiorari to the United States Court Of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The respondent respectfully files this Brief in opposition to the petition for writ of certiorari filed by the United States of America.

OPINIONS BELOW

Respondent adopts the statement of the petitioner with respect to opinions below.

JURISDICTION

Respondent adopts the statement of the petitioner with respect to jurisdiction.

QUESTION PRESENTED

Whether value as a port-site, both historical and actual, should be included in arriving at just compensation for the taking of privately-owned riparian land when condemned by the United States for flood control, river improvement and hydroelectric development.

STATEMENT

The Statement by petitioner is substantially accurate except petitioner persists in designating the respondent's riparian lands as being a "*potential*" port-site. This is incorrect. The record clearly shows that respondent's riparian properties were historically utilized as a port-site and that at the time of the taking were primarily valuable as a port-site. The Court of Appeals correctly stated the factual situation in the opening paragraph of its opinion:

> "Appellants owned two tracts of land along the Columbia River, about six miles upstream from the present John Day Dam. On November 1, 1962, they leased this and other property to the State of Oregon, which wanted it for an industrial park. That industrial development, for maximum utility, required access to the Columbia River; because two railroads and the United States

owned most of the land along the river, appellants' property was especially valuable as a port site. The lease agreement gave Oregon an option to purchase the land. Most of the land was priced, under the option, at $150 per acre; the balance, denominated 'port site property' in the agreement, was priced at $400 per acre."

Except as noted above, respondent adopts the petitioner's Statement.

SUMMARY OF ARGUMENT

(1) *United States* v. *Twin City Power Co.*, 350 U.S. 222, and *United States* v. *Virginia Electric & Power Co.*, 365 U.S. 624 are distinguishable from the case at bar and the opinion of the Court of Appeals for the Ninth Circuit clearly illustrates the distinguishable characteristics.

(2) Respondents' waterfront properties were and still are actual port-sites, not "potential" port-sites as petitioner has sought to characterize them.

(3) There is a major distinction between values attributable to the "flow of a stream" and values attributable to uplands by reason of access to navigable channels.

(4) No reasons exist for granting the requested writ.

(5) Rights of riparian access, translatable in terms of port-site value, have been held to be valuable — and compensable — property rights for hun-

dreds of years, both in England and in this country.

(6) The historical proprietary nature of riparian rights was reaffirmed in the Submerged Lands Act, 67 Stat. 29, 30, 32, 43, U.S.C. 1301, 1314.

(7) Petitioner's claim, if sustained, would cast doubt upon the values of hundreds of billions of dollars of riparian lands throughout the United States and stultify industrial development on lands bordering navigable waterways.

ARGUMENT

The position taken by the petitioner is clearly an attempt to use certain language in *United States* v. *Twin City Power Co.*, 350 U.S. 222, and *United States* v. *Virginia Electric & Power Co.*, 365 U.S. 624 as support for a proposition for which those two cases do not stand and for which this court did not intend they should stand.

The Court of Appeals for the Ninth Circuit has very ably distinguished these two cases from the case at bar. (App. A, Petitioner's Petition for Writ of Certiorari, pp. 6a-11a) Nothing further need be said.

However, respondent calls attention to the patent attempt of the petitioner to label respondent's riparian properties as a "potential" port-site. This is an error. (See App. A, Petition for Writ of Certiorari, pp. 1a-2a)

Respondent also calls attention to the fact that there is a significant difference between a value at-

tributable to the "flow of a stream"—which was involved in *Twin City* and *Virginia Power* — and the value of riparian lands attributable to the presence of water. Indeed, respondent's riparian properties would be more valuable if it were not for the "flow of the stream" as the current impedes river traffic on the Columbia River.

The inequity of the petitioner's position was aptly characterized by the Court of Appeals for the Ninth Circuit in its comment concerning *United States* v. *River Rouge Improvement Co.*, 1926, 269 U.S. 411;

> "* * * This is a fundamental and inequitable inconsistency, designed to give the government the best of both worlds. But if it is fair to allow compensation to be reduced by resulting benefit to retained property; then fairness dictates that the additional value of property taken, attributable to the same source (here, riparian location), should be paid for." (App. A, Petition for Writ of Certiorari, pp 13a).

The respondent also notes with surprise the petitioner's statement concerning the Submerged Lands Act, contained in Footnote 7, page 9, Petition for Writ of Certiorari, "Furthermore, the Act concerned only submerged lands within the marginal sea." The act specifically relates to lands beneath navigable waters and includes inland waters as well as marginal seas, 43 U.S.C. 1301(a).

Reasons for Not Granting the Writ

(1) Sound judicial discretion does not require the granting of the writ. To the contrary, no grounds exist for granting it. Rule 19 relating to considerations governing review on certiorari enumerate the character of reasons which will be considered by the Court in granting writs. None of those reasons appear. There is no conflict on this question among the various circuits and no federal questions have been decided in any way in conflict with applicable decisions of this Court. To the contrary, the decision of the Court of Appeals for the Ninth Circuit is merely a reaffirmation of existing law exemplified by such cases as *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53.

(2) Since the inception of our systems of common law in England, riparian access has been recognized as a valuable property right. Lord Hale commented on the doctrine of riparian access in his treatise *De Jure Maris* and, as this Court pointed out in *Shively* v. *Bowlby*, 152 U.S. 1, the common law of England upon this subject at the time of the emigration of our ancestors is the law of this country. In an unbroken line of decisions since the beginning of our history, this Court has recognized the doctrine of riparian access and its compensability. This doctrine is not diluted by *Twin City* and *Virginia Power*.

(3) The Congress has reaffirmed the historical proprietary nature of riparian rights in the Submerged Lands Act, 67 Stat. 29, 30, 32, 43 U.S.C. 1301, 1314. The intent of Congress in passing the Act

to protect all property rights inhering in waterfront ownership on inland and coastal waters — with the sole exception of water power or the use of water for the production of power — shows through with startling clarity. As Senator Holland pointed out (99 Cong. Rec. 2750):

> "* * * Taking the nation as a whole, there are undoubtedly several billion dollars worth of port facilities alone, located on inland waters or on built-up lands which were once inland waters, so that it is easy to understand why the attorneys general, municipal officers, port authorities, and other similar officials, are deeply concerned in this fight and are insistent that the Congress shall effectually release to the States and their grantees all property right in the inland waters and their beds, saving only to the Federal government those rights which will enable it to perform its constitutional functions. * * *"

The petitioner has noted that within the Ninth Circuit the decision will affect the result in a number of pending cases and may also bear on the disposition of some $10,000,000 of pending claims. It would be more accurate to note that if the petitioner's claim is sustained, the effect upon the hundreds of billions of investment throughout the nation in port facilities alone would be catastrophic. No financier would be interested in lending monies to be utilized for the construction of wharves and docks on navigable streams if the entire investment could be taken without compensation.

The development of industry and wharf facilities

on riparian sites has risen to unprecedented levels in recent years. For example, in 1965 alone, a total of 512 new plants or plant expansions on navigable waters or adjacent to navigable waterways was announced. The value attributable to only 267 of these facilities amounted to $6,293,700,000. Included among these facilities were 109 terminals, docks and wharves.[1]

The incongruity of the petitioner's course of action in pressing this novel concept of non-compensability for riparian location, while at the same time spending billions of dollars to improve our navigable waterways and promote port development, is thus clearly demonstrated. Can anyone believe that the unprecedented development of industry and terminal facilities on our vast system of inland waterways will continue if the right of riparian access can be destroyed without compensation?

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted.

Of Counsel: SIDNEY TEISER
ALEX L. PARKS
ROBERT ABRAMS

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[1] Waterside Site Plant Locations and Expansions, 1965, The American Waterways Operators, Inc., March, 1966.

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 54

UNITED STATES OF AMERICA, PETITIONER

v.

R. B. RANDS, ET UX.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The district court's memorandum opinion of October 12, 1964 (R. 35-36) is unreported.[1] The opinion of the court of appeals (R. 91-101) is reported at 367 F. 2d 186.

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[1] An earlier opinion of the district court (R. 32-34), involving an issue that is not now before this Court, is reported at 224 F. Supp. 305.

JURISDICTION

The judgment of the court of appeals (R. 102) was entered October 7, 1966. By orders of January 9 and February 2, 1967, the time for filing a petition for a writ of certiorari was extended to and including February 20, 1967 (R. 103-104). The petition for a writ of certiorari was filed on that date and granted on April 10, 1967 (R. 105; 386 U.S. 989). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, when land bordering a navigable stream is taken by the United States for a river improvement project, the condemnee is entitled to receive compensation not only for the land's value as upland but also for such incremental value as the land may have had as a site for a port.

STATUTES INVOLVED

The River and Harbor Act of 1950, c. 188, 64 Stat. 163, 170, 178, 179, provides in pertinent part:

> Sec. 204. The following works of improvement for the benefit of navigation and the control of destructive floodwaters and other purposes are hereby adopted and authorized to be prosecuted under the direction of the Secretary of the Army and the supervision of the Chief of Engineers in accordance with the plans in the respective reports hereinafter designated and subject to the conditions set forth therein: * * *.
>
> * * * *

COLUMBIA RIVER BASIN

* * * *

In addition to previous authorizations and authorizations herein, the projects listed below for flood control and other purposes in the Columbia River Basin (including the Willamette River Basin) substantially in accordance with the plans recommended in the report of the Chief of Engineers dated June 28, 1949, and approved in the letter dated February 1, 1950, from the Director of the Bureau of the Budget for construction by the Corps of Engineers, both contained in House Document Numbered 531, Eighty-first Congress, second session, are hereby approved, and there is hereby authorized to be appropriated the sum of $75,000,000 for the partial accomplishment of those projects and for the continued prosecution of the comprehensive plan for the Willamette River Basin approved in the Act of June 28, 1938, as amended and supplemented by subsequent acts of Congress: * * *.

John Day Dam, Columbia River, Washington and Oregon.

* * * *

The Act of July 14, 1960, 74 Stat. 480, 486-487, 33 U.S.C. 578, provides in pertinent part:

Sec. 108. (a) That whenever the Secretary of the Army, upon the recommendation of the Chief of Engineers, determines that notwithstanding the provisions of the Federal Property and Administrative Services Act of 1949 (63 Stat. 377), as amended, with respect to disposal of surplus real property, (1) the development of public port or industrial facilities on land which is part of a water resource development project

under his jurisdiction will be in the public interest; (2) that such development will not interfere with the operation and maintenance of the project; and (3) that disposition of the property for these purposes under this section will serve the objectives of the project within which the land is located, he may convey the land by quitclaim deed to a State, political subdivision thereof, port district, port authority, or other body created by the State or through a compact between two or more States for the purpose of developing or encouraging the development of such facilities. In any case, where two or more political subdivisions thereof, or bodies created by, a State or group of States, seek to obtain the same land, the Secretary of the Army shall give preference to that political subdivision or body whose intended use of land will, in his opinion, best promote the purposes for which the project involved was authorized.

(b) Any conveyance authorized by this section shall be made at the fair market value of the land, as determined by the Secretary of the Army, upon condition that the property shall be used for one of the purposes stated in the subsection (a) of this section only, and subject to such other conditions, reservations or restrictions as the Secretary may determine to be necessary for the development, maintenance, or operation of the project or otherwise in the public interest.

(c) Prior to the conveyance of any land under the provisions of this section, the Secretary of the Army shall, in the manner he deems reasonable, give public notice of the proposed con-

veyance and afford an opportunity to interested eligible bodies in the general vicinity of the land to apply for its purchase.

STATEMENT

Respondents owned two tracts of land riparian to the Columbia River,[2] which the government condemned in connection with the John Day Lock and Dam Project. The project was authorized by Congress in 1950[3] as part of "a comprehensive plan for the development of the Columbia River and its tributaries."[4] As proposed by the Corps of Engineers and approved by Congress, the John Day Dam would create a lake 75 miles long and was intended to "contribute 2,000,000 acre-feet of flood control storage toward control of floods on lower Columbia River and 735,000 kilowatts of prime power to the northwest power system, and * * * substitute 75 miles of slack water for a hazardous open-river navigation channel."[5]

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[2] Tract 2403, containing 121 acres, and Tract 2514, containing 139 acres (R. 7, 37).

[3] River and Harbor Act of 1950, 64 Stat. 163, 179.

[4] See Report of the Chief of Engineers, United States Army (1949), H. Doc. No. 531, 81st Cong., 2d Sess., Vol. 1, p. 1.

[5] *Id.* at 282. Subsequent modifications of the original proposal are reflected in S. Doc. No. 10, 85th Cong., 1st Sess. (1957). The lake created behind John Day Dam, in conjunction with those formed by other dams both upstream and downstream from John Day, completes a continuous slack-water pathway stretching 325 miles inland from the Pacific Ocean. Completion of further authorized projects will extend this waterway by an additional 140 miles, permitting slack-water navigation for the Pacific to Lewiston, Idaho.

Respondents' land was condemned because it lies almost entirely within the area to be flooded by the reservoir (R. 33, R. 94 n. 2). In condemnation proceedings in the United States District Court for the District of Oregon, respondents urged that, while most of their land should be valued as suited for agricultural purposes or the extraction of sand and gravel, a small portion (Lots 1 and 2 in Tract No. 2514) could be utilized as a port site and should be compensated for on the basis of that more valuable potential (R. 38). Prior to trial, however, the district court ruled that the land's value as a port site, since entirely derived from the adjacent navigable river, was subject to the federal government's navigational servitude and therefore that such value was not to be considered in determining just compensation (R. 35-36). In reaching that conclusion, the trial court observed (R. 35):

> I am unable to distinguish between the value of land as a site for hydroelectric power purposes, the issue before the court in *United States* v. *Twin City Power Co.*, 350 U.S. 222 (1955), and the value of land as a site for port operations. The successful operation of each depends on the flow of the stream. A port without water is no more susceptible to successful operation than would be a hydroelectric plant without its source of power. * * *

In accordance with this ruling, evidence of value at trial was limited to the land's utility for sand, gravel and agriculture (R. 37-38). The jury awarded $7,000 as just compensation for Tract No. 2514 (R. 67); the

parties then stipulated that $2,420 was just compensation for Tract 2403 (R. 68). Respondents' submitted an offer of proof supporting a port-site value for Lots 1 and 2 in Tract 2514 of not less than $50,000 (R. 44-67). Included in the offer of proof was a quitclaim deed from the United States to the State of Oregon, conveying 2,261 acres, including the land previously taken from respondents, for $17,500 (R. 54-67). The deed recites that the conveyance is made pursuant to P.L. 86-645. (33 U.S.C. 578), which authorized the Secretary of the Army to dispose of surplus real estate for the development of port or industrial facilities by State agencies. The deed reserves to the United States, *inter alia*, an easement of flow for the waters impounded by the John Day Dam, the right to prevent the erection of any structures except those approved by the United States, and the right to construct, operate and maintain navigational markers, water gaging stations and other facilities appropriate to the operation of the federal project (R. 61). The land reverts to the United States if the State of Oregon fails to develop port and industrial facilities within 20 years (R. 64).

On appeal, the Ninth Circuit held that the district court erred in excluding consideration of the port-site value of respondents' land (R. 91-101).[6] The court

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[6] In addition to the question of port-site value, the court of appeals also reviewed the question whether the district court erred by its refusal (R. 32-34) to allow respondents to file, after the time allowed by Rule 71A(e), F. R. Civ. P., had elapsed, an answer (R. 29-32) challenging the right to take. The court of appeals held (R. 92-94) that whether the 20-day

of appeals held that a riparian owner on a navigable stream holds, as against the federal government, a compensable right to the use and enjoyment of the stream in connection with a port site and that the power-site value, held noncompensable in *United States* v. *Twin City Power Co.*, 350 U.S. 222, is distinguishable from port-site value. The court also found the government's position inconsistent with the policy of the Submerged Lands Act (43 U.S.C. 1301 *et seq.*), and with the statutory rule that, where a portion of the tract is taken by the government for use in connection with river or harbor improvements, the compensation attributable to the part taken shall be reduced by "any special and direct benefits to the remainder arising from the improvement" (33 U.S.C. 595). The court of appeals reversed and remanded the case for a new trial. The United States petitioned for a writ of certiorari, which was granted on April 10, 1967 (386 U.S. 989).

SUMMARY OF ARGUMENT

The court of appeals held that, in condemning riparian land on a navigable river in connection with a river improvement project, the United States must pay the riparian owner not only for the value inhering in the property as upland but also for the additional value the land may have as a port site. It is not disputed that the project involved—the John Day Lock

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limit provided by Rule 71A(e) is absolute or subject to the discretion of the district court under Rules 6(b)(2) and 60(b)(1), the result reached by the trial court was correct. Neither party has sought review of that holding in this Court.

and Dam on the Columbia River—is a lawful exercise of the government's navigational servitude under the Commerce Clause. Nor is it questioned that the port site value of the respondent's property is wholly attributable to its location on navigable waters. On these facts, we think it plain no special award is due because the government frustrated the potential use of the property as a port-site.

1. This Court has consistently recognized that riparian rights upon navigable streams, although recognized by State law and valuable in transactions between private persons, are nonetheless subject to the federal government's dominant navigational easement and, hence, may without compensation be diminished or entirely destroyed by federal projects within the scope of the commerce power. Thus, the Court has repeatedly rejected claims for the loss of access to navigable waters—which is the basis of port site value—when such loss resulted from the government's construction of jetties in front of riparian property, dredging operations, or the complete diversion of a stream. The rationale underlying all of those cases is that the values derived from the great inland waterways are national assets rather than the private property of strategically located riparian owners and that federal projects for the improvement of such waterways are not to be burdened by the cost of recapturing values deemed part of the public domain.

At all events, we submit the port-site value claimed by respondents is logically indistinguishable from the

power-site value of fast lands which this Court has held to be non-compensable because derived from riparian location. In both instances, the special value derives from the commercial potential of the waterway. And, in both, the use for which additional compensation is claimed is subject to federal licensing. The court of appeals, it seems to us, failed to find any sufficient basis for distinguishing the power-site cases.

2. Finally, we believe the court of appeals was mistaken in finding support for its conclusion either in 33 U.S.C. 595 or in the Submerged Lands Act (43 U.S.C. 1301 *et seq.*). The first of these statutes provides that the government need pay a condemnee only for his net loss and that the award should be reduced by the amount of any enhancement in the value of his remaining property resulting directly from the project which occasioned the taking. This rule is in no way inconsistent with the government's position here. To recognize that the market value of riparian land may be enhanced by public projects does not prejudice the question whether the government itself must pay when it frustrates a potential use in the exercise of the federal navigational servitude.

As to the Submerged Lands Act, we point out that its effect on inland waterways was merely to confirm the States' title to the lands beneath such waters, that it expressly reserves to the United States its navigational servitude, and that it does not express any policy inconsistent with our position here.

ARGUMENT

IN CONDEMNING LAND RIPARIAN TO A NAVIGABLE RIVER, THE UNITED STATES IS NOT REQUIRED TO PAY FOR THE VALUE THE LAND HAS AS A SITE FOR A PORT.

A. *The Value of Land as a Port Site Derives from its Relationship to Navigable Water and, Like Power-Site Value, is Subject to the Federal Government's Navigational Servitude.*

Land strategically located on navigable streams undeniably enjoys potentialities, unavailable elsewhere, which may make the property more valuable in transactions between private individuals. *Boom Co.* v. *Patterson*, 98 U.S. 403; *Ford & Son* v. *Little Falls Co.*, 280 U.S. 369. But that does not resolve the question whether the government must pay for such special values when it takes riparian lands. The liability of the United States is not governed by cases which "deal with the rights of riparian owners upon navigable or non-navigable streams as between each other." *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, 70; *United States* v. *Willow River Co.*, 324 U.S. 499.

The unique position of the United States derives from the Commerce Clause, which from the earliest days of the Republic has been recognized as reserving to the national government very broad powers over navigation and navigable waters. *Gibbons* v. *Ogden*, 9 Wheat. 1, 189-193. A century ago this Court wrote: "The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other

than that in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress." *Gilman* v. *Philadelphia*, 3 Wall. 713, 724-725; *United States* v. *Chandler-Dunbar Co.*, *supra*, at 63. And in *Gibson* v. *United States*, 166 U.S. 269, 271-272, the Court observed that "although the title to the shore and submerged soil [of navigable rivers] is in the various States and individual owners under them, it is always subject to the servitude in respect of navigation created in favor of the Federal government by the Constitution."

Whether properly denominated a "dominant servitude," *Federal Power Commission* v. *Niagra Mohawk Power Corp.*, 347 U.S. 239, 249, "a superior navigation easement," *United States* v. *Grand River Dam Authority*, 363 U.S. 229, 231, a "power" or "privilege", *United States* v. *Twin City Power Co.*, 350 U.S. 222, 225; see Note, *Power Site Value in Eminent Domain Proceedings: A New Toll Charge For Water Resource Development*, 65 Yale L.J. 96 n. 5, the practical significance of the federal interest is that the great inland waterways have been deemed national assets rather than the private property of riparian owners. "[T]hat the running water in a great navigable stream is capable of private ownership is inconceivable." *United States* v. *Chandler-Dunbar Co.*, *supra*, at 69. "Nor does a riparian owner acquire a unique private right distinct from that held by all others, to have access to and enjoyment of navigable waters and to recover compensation from the government because deprived of that

privilege by an authorized governmental change in a stream. * * * Riparian rights of access to navigable waters cannot, as against the government's power to control commerce, be bought and sold." *United States* v. *Commodore Park*, 324 U.S. 386, 390-391 (footnote omitted). In sum, the values that derive from the location of lands on navigable streams are always subject to the federal navigational servitude which the government is free to exercise at any time without liability.

Thus, the Court has held that a riparian owner has no right of recovery against the United States for the impairment or destruction of access to the stream by the placement of a dike or jetty in front of his property. *Gibson* v. *United States, supra; Scranton* v. *Wheeler*, 179 U.S. 141. Nor can he recover when navigable waters are filled in with material dredged from other navigable waters, *United States* v. *Commodore Park, supra*, or when the course of the stream is diverted, *South Carolina* v. *Georgia*, 93 U.S. 4, 10-11. Similarly, when fast lands are taken in connection with a public project, the United States is not required to compensate for so much of their value as is attributable to their strategic location upon a navigable stream. As this Court pointed out in *United States* v. *Virginia Electric Co.*, 365 U.S. 624, 629:

> * * * [J]ust as the navigational privilege permits the Government to reduce the value of riparian lands by denying the riparian owner access to the stream without compensation for his loss, *United States* v. *Commodore Park*, 324 U.S. 386, 390-391; *Scranton* v. *Wheeler*, 179

U.S. 141, 162-165; *Gibson* v. *United States*, 166 U.S. 269, 276, it also permits the Government to disregard the value arising from this same fact of riparian location in compensating the owner when fast lands are appropriated.

Specifically, that has been the holding in cases where additional compensation was sought for special value of land for hydroelectric power development. Such a claim was rejected in *United States* v. *Chandler-Dunbar*, *supra*, the Court observing that "the Government cannot be justly required to pay for an element of value which did not inhere in these parcels as upland" (229 U.S. at 76). And the same ruling was made in *United States* v. *Twin City Power Co.*, 350 U.S. 222, and *United States* v. *Virginia Electric Co.*, 365 U.S. 624.

It is not apparent why the rationale of these cases should not govern here. Indeed, for condemnation purposes, the port-site value of riparian land would seem to be indistinguishable from power-site value. As the district court said, "A port without water is no more susceptible to successful operation than would be a hydroelectric plant without its source of power" (R. 35). In both cases, the special value of the fast land is wholly attributable to its riparian location. It cannot matter whether that value is related to the capacity of water in a navigable river to carry vessels in commerce, or to its capacity to generate hydroelectric power; in either event we are dealing with a public resource, subject to recapture or governance by the sovereign in the exercise of its navigational servitude. Nor does the fact that hydro-

electric development requires a federal license (16 U.S.C. 791a *et seq.*) furnish a basis for distinguishing our case; licensing is also a prerequisite to port development. See 33 U.S.C. 403. Indeed, if differences were to be noticed, one would suppose port-site value is more closely related to the federal navigational servitude—once viewed as reaching only water commerce. See *United States* v. *Appalachian Power Co.*, 311 U.S. 377, 426. It would be most strange if the government's liability were greater when, in exercising that servitude, it took a port site rather than a power site.

Notwithstanding these considerations, the court of appeals held that the rule articulated in the power-site cases "excluding all value attributable to riparian location" (*United States* v. *Virginia Electric Co.*, *supra*, at 631) is inapplicable to port sites. The consequence, it seems to us, is to burden a federal project with the cost of extinguishing the riparian owner's right of access to a navigable stream—a right that has always been held to be terminable without compensation (*Scranton* v. *Wheeler*, *supra*; *United States* v. *Commodore Park*, *supra*)—in effect "creat-[ing] private claims in the public domain." *United States* v. *Twin City Power Co.*, *supra*, at 228. We turn to examine how such a result is sought to be justified.

In attempting to distinguish the prior decisions of this Court, the court of appeals pointed out (R. 96) that *Commodore Park*, *supra*, held only that a riparian owner was not entitled to compensation from the United States for loss of access to navigable waters

resulting from dredging operations *where there was no invasion of the fast lands themselves.* Presumably the court thought a different rule applies where the government takes the fast land as well as the right of access. That seems to us a dubious distinction: it amounts to saying that the obligation to pay a landowner for the value of his access to a navigable stream—in addition to the non-riparian value of the parcel taken—depends upon whether the government proceeds in two steps or one.

Moreover, the court's reasoning affords no satisfactory explanation as to why fast lands may be taken without compensation for their power-site value but not without compensation for their port-site value. Clearly there is no merit in the thesis advanced by respondents (Br. in Opp., pp. 4-5), and perhaps entertained by the court of appeals (see R. 95), that the power-site cases denied riparian owners a compensable interest in "the *flow* of the stream," whereas it is not the "flow" (*i.e.*, the current) but the stream itself that the port-site owner values. There is no support for the notion that the public domain embraces only the motion of the water and not the water itself. At the very least, it is clear that the riparian owner has no compensable interest in the navigable character of a stream or its capacity otherwise to serve interstate commerce. The gist of the power-site cases as we read them is that the riparian owner's strategic location does not entitle him to levy a toll on federal projects for the development of the nation's navigable waterways. The applicability of that rule surely does not turn on the question whether

the waters involved are rushing rapids suitable for power development or a slack-water channel appropriate for a port-site.

The court below (see R. 96, 97) also sought to differentiate power-site from port-site value on the basis of this Court's decision in *United States* v. *Chandler-Dunbar Co.*, *supra*, which, while reversing an award for power-site value, affirmed an award of compensation for the land's value as the site of a canal and lock to pass around "the falls and rapids of the river" (229 U.S. 67, 76-78). To be sure, the rationale for the distinction made in *Chandler-Dunbar* is not entirely clear. It may be that the Court thought the land's value as the potential bed of an artificial channel circumventing the river's regular course was not attributable to its riparian location but precisely to its quality as upland, away from falls and rapids. Alternatively, as the Court suggested in *United States* v. *Twin City Power Co.*, *supra*, 350 U.S. at 226 n. *, this aspect of the decision in *Chandler-Dunbar* may have been "influenced by the fact that, on the special facts of the case, the use of the land for canals and locks was wholly consistent with the dominant navigation servitude of the United States and indeed aided navigation." In contrast, construction of a port on respondent's land, while abstractly a navigational use, was actually inconsistent with the congressional purpose to improve navigability through the creation of a reservoir that will flood the land. At all events, it is fair to say that this Court's subsequent decisions in *Twin City* and *Virginia Electric* have confined *Chandler-Dunbar* to "the special facts of the case"

(*United States* v. *Twin City Power Co.*, *supra*, at 226 n. *) and there is no warrant for extending that holding here.[7] We conclude that the court of appeals, contrary to the teaching of *Chandler-Dunbar*, has required the government to pay "for an element of value which did not inhere in these parcels as upland" (229 U.S. at 76) and which was not "taken" from respondents because it had never been owned by them.

B. *Neither 33 U.S.C. 595, nor the Submerged Lands Act Requires the Payment of Port-Site Value.*

1. The court of appeals found further support for its conclusion (R. 99) in the statutory rule (33 U.S.C. 595) that, where a portion of a parcel of land is taken for public use "in connection with any improvement of rivers, harbors, canals, or waterways of the United States," the value attributable to the part taken shall be reduced, in awarding compensation, by "any special and direct benefits to the remainder arising from the improvement." This is, indeed, a well settled principle of federal condemnation

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[7] We also note that the language quoted by the court below (R. 97) from the *Chandler-Dunbar* opinion—to the effect that "riparian owners upon public navigable waters" have a "right of access to deep water, and when not forbidden by public law may construct for this purpose, wharves, docks and piers"—is not drawn from the portion of the opinion dealing with the lock and canal question and, moreover, is immediately qualified with the statement: "But every such structure in the water of a navigable river is subordinate to the right of navigation, and subject to the obligation to suffer the consequences of the improvement of navigation" (229 U.S. at 70).

law, upheld against constitutional challenge as long ago as *Bauman* v. *Ross*, 167 U.S. 548. As construed in *United States* v. *River Rouge Co.*, 269 U.S. 411, the rule requires that, in awarding compensation for riparian land taken for a harbor improvement, the jury should be instructed to consider any enhancement in the port-site value of the condemnee's remaining property attributable to the improvement. This led the court below to reason that "if it is fair to allow compensation to be reduced by resulting benefit to retained property, then fairness dictates that the additional value of property taken, attributable to the same source (here riparian location), should be paid for" (R. 99).

This argument, while superficially plausible, does not withstand analysis. The symmetry of the two propositions is wholly illusory. Indeed, by definition, the offset rule applies only where part of the landowner's property is taken; it does not operate when the whole tract is condemned. Yet, surely no one would suggest that the government's obligation to compensate a riparian owner for port-site value depends upon how much of his property is condemned, all or merely a part. The offset rule is no more than a corollary of the principle allowing recovery for severance damages where the value of the remaining parcel is diminished, rather than increased, by a partial taking. See *United States* v. *Miller*, 317 U.S. 369, 376.

More fundamentally, the argument premised on the offset rule ignores the realities of two wholly distinct situations. When, in the exercise of its navigational

servitude, the government incidentally destroys the "navigational" value of riparian land, it takes nothing it did not already enjoy—and, consequently, owes no compensation to the landowner. On the other hand, if the special benefits attributable to a governmental project were not taken into account when a partial taking occurs, the condemnee's loss would be fictitiously inflated. For the new potentialities of the remaining parcel—although subject to frustration by the government—do, in fact, enhance its market value.

These two rules, it seems to us, may co-exist without inconsistency or unfairness. Certainly, nothing in *River Rouge* suggests that the rules are incompatable. On the contrary, in holding that the port-site value created by the governmental project must be offset against the award, the Court there noted that the landowner would have access to the waterway and a right to construct and maintain docks "until taken away by the government in the due exercise of its power of control over navigation." 269 U.S. at 420. The implication is that the value of these new benefits, although substantial, should be discounted by the possibility of termination by the government without payment.

Nor is there any basis for a claim of unfairness here because, subsequent to the condemnation, the United States sold the land in suit to the State of Oregon for port and industrial purposes pursuant to 33 U.S.C. 578. The court below was in error if it assumed that the government was taking land at a price from which port-site value was excluded and

reselling it at a price that reflected port-site value. In the first place, the government did not sell what it took, for the deed to the State of Oregon reserves to the United States various rights including a perpetual easement of flow which entitles the government to keep the land flooded to the extent necessary when the pool at John Day Dam reaches an elevation of 268 feet above mean sea level (R. 61). As the map contained in the Record (at p. 23) indicates, respondents' port site will be entirely submerged when the pool reaches that elevation. Moreover, the government made no profit here. The quitclaim deed shows the government conveyed 2,261 acres to the State of Oregon for $17,500 (R. 54, 60), or less than $8 per acre—whereas the district court awarded the respondents $9,420 for 260 acres, excluding port-site value (R. 69), or more than $36 per acre.

And, finally, the court of appeals to the contrary notwithstanding, our case is in no way comparable to *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312. There the United States took a lock and dam built by the company "at the instance and implied invitation of Congress" (148 U.S. at 334) and was held liable not only for the tangible property taken but also for the value of the franchise to collect tolls, that is, for the going-concern value of the enterprise. As this Court has subsequently noted on several occasions (see, *e.g.*, *Omnia Co.* v. *United States*, 261 U.S. 502, 513-514; *United States ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266, 281), the holding "rested primarily upon the doctrine of estoppel." While the

continuing vitality of *Monongahela* may be doubted (see *ibid.*), it can have no relevance here where no facilities whatever have been constructed, where there is no element of estoppel, and where no going-concern value is claimed.

2. The court of appeals also invoked the Submerged Lands Act, 43 U.S.C. 1301-1343, in support of its holding that the United States must compensate respondent for the port-site value of the property taken (R. 100-101). The relevance of that statute is not immediately apparent. Insofar as it bore upon inland navigable waters, the Act was intended to do no more than confirm the long recognized title of the States and their grantees to the lands beneath such waters (see *Pollard* v. *Hagan*, 3 How. 212), while at the same time expressly reserving to the United States "all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs" (43 U.S.C. 1314(a)). As the Senate Committe on Interior and Insular Affairs observed (S. Rep. No. 133, 83d Cong., 1st Sess., p. 8):

> The purpose of this legislation is to write the law for the future as the Supreme Court believed it to be in the past—that the States shall own and have proprietary use of all lands under navigable waters within their territorial jurisdiction * * * subject only to the governmental powers delegated to the United States by the Constitution.

The court below concluded, however, that the government's position here would "subvert" the policy of the Act by "inhibiting development of riparian property where the riparian nature of that property contributes significantly to its value and there is a reasonable possibility that it may at some time be taken by the Government for its own use in some navigation-connected projects" (R. 101). Assuming the relevance of this argument, we believe that it is mistaken. Often the value of riparian lands is enhanced, not diminished, by governmental improvements to the waterway. And, obviously, increasing the cost of prospective federal projects for the improvement of navigation will not encourage their undertaking. See Report of the President's Water Resources Policy Planning Commission 59-65 (1950); Note, *Power Site Value in Eminent Domain Proceedings: A New Toll Charge For Water Resource Development*, 65 Yale L.J. 96, 101-102. Furthermore, if riparian owners can recover port-site value when undeveloped land is taken by the government, the impetus to private development will, if anything, be materially reduced. Accordingly, we cannot agree that the government's position here will subvert the policy of the Submerged Lands Act.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the judgment of the district court reinstated.

Respectfully submitted.

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JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 54

UNITED STATES OF AMERICA,

Petitioner,

v.

R. B. RANDS, ET UX,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 54

UNITED STATES OF AMERICA,

Petitioner,

v.

R, B. RANDS, ET UX,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE RESPONDENTS

OPINIONS BELOW

Respondents adopt petitioner's statement as to Opinions Below.

JURISDICTION

Respondents adopt petitioner's statement as to Jurisdiction.

QUESTIONS PRESENTED

1. Whether the constitutional requirement of "just compensation" relating to the highest and best use of condemned uplands may be diminished by the Federal Government's power to control navigation so as to require less than full compensation?

2. Whether the port-site value of lands next to navigable waters must be eliminated to comply with the rule of *Twin City* and *Vepco* that power-site value of lands be disregarded in condemnation?

3. Whether policy is found in Acts of Congress indicating that full compensation is to be paid for riparian proprietary rights.

STATUTES INVOLVED

In addition to the Statutes cited by petitioner, the following are applicable:

33 U.S.C. § 595 (1958):

> In all cases where private property shall be taken by the United States for the public use in connection with any improvement of rivers, harbors, canals, or waterways of the United States, and in all condemnation proceedings by the United States to acquire lands or easements for such improvements, where a part only of any such parcel, lot, or tract of land shall be taken, the jury or other tribunal awarding the just compensation or assessing the damages to the owner,

whether for the value of the part taken or for any injury to the part not taken, shall take into consideration by way of reducing the amount of compensation or damages any special and direct benefits to the remainder arising from the improvement, and shall render their award or verdict accordingly.

33 U.S.C. § 701-1 (b) (1958):

(b) The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining or industrial purposes.

40 U.S.C. § 258(a) (1958):

In any proceeding in any court of the United States outside the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. . . .

43 U.S.C. § 1301 (a) & (e) (1958):

When used in this chapter—

(a) The term "lands beneath navigable waters" means—

(1) all lands within the boundaries of each of the respective States which are covered by non-tidal waters that were navigable under the laws of the United States at time such State became a member of the Union, or acquired sovereignty over such land and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction;

(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles, and

(3) all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined;

(e) The term "natural resources" includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life but does not include water power, or the use of water for the production of power;

43 U.S.C. § 1311 (a), (d), (e) (1958):

(a) It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (a) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with the applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located and the respective grantees, lessees, or successors in interest thereof;
* * *

(d) Nothing in this chapter shall affect the use, development, improvement, or control by or under the constitutional authority of the United States of said lands and waters for the purposes of navigation or flood control or the production of power, or be construed as the release or relinquishment of any rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation, or to provide for flood control, or the production of power;

(e) Nothing in this chapter shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian, relating to the ownership and control of ground and surface waters; and the control, appropriation, use, and distribution of such waters shall continue to be in accordance with the laws of such states.

43 U.S.C. § 1314 (a) (1958):

> (a) The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 1311 of this title.

STATEMENT

Petitioner's Statement is generally correct but requires amplification.

Respondents own lands on the Columbia River at the site of the historic Castle Rock landing. This land is and has been through past years bordered by deep water, sufficient to permit commercial navigation close to the shore. The location is upriver from the John Day Dam. It now forms a portion of the waterfront "Boardman Space Age Park," an industrial development project of the State of Oregon.

The State of Oregon began seeking lands for this project when it learned, about seven years ago, that a major aeronautical company might be induced to locate a testing operation in Eastern Oregon (R. 49). The State commenced a site search which culminated

in the negotiation of a lease and option to purchase the respondents' lands (R. 52). The option price was approximately $58,595.00 (computed from R. 52, 53).

The option (but not the lease) was relinquished when the state found it could acquire the land through the use of the federal power of eminent domain, in connection with construction of the John Day Dam. Meanwhile, Oregon had arranged with the Federal Government to exchange part of the Boardman bombing range, the bulk of the "Space Age Park," for state-owned lands elsewhere in the state.

Before Oregon acquired the tract desired for the development project, it had already made a lease to the Boeing Company (on July 2, 1963) including the property described in the Federal Government's quitclaim deed (R. 54). The relevant portions of the lease are set forth in Appendix A of this Brief. The lease payment is $60,000 per year. Oregon paid $17,500 for the property, according to the federal deed of September 25, 1963 (R. 54).

On August 13, 1963, the United States Government filed a Declaration of Taking in condemnation of certain lands situated along the Columbia River south shore in the State of Oregon (R. 25). Title was claimed under the provisions of 40 U.S.C. § 258a (1958), which provides that Declaration of Taking must declare that "lands are thereby taken for the use of the United States." The Government failed to use the statutory language.

The highest and best possible use of the lands taken from the respondents was as a port site. Generally, private port-site land is not readily available along the Columbia River and land otherwise suitable for ports is either owned by the Government or blocked from land access by Union Pacific Railroad on the Oregon shore and the Seattle-Portland-Spokane Railroad on the Washington shore. Respondents' lands, however, were accessible from land and suitable for use as a port, whether or not the John Day Dam was ever built (R. 47).

Respondents sought to establish the port-site value of the land as its highest and best use. But it was ruled by the District Court, in advance of trial, that the value of lands as a port-site was not a compensable interest because it was subject to the overriding navigational servitude in the United States (R. 35).

SUMMARY OF ARGUMENT

The government may exercise its control of commerce within the bed of a navigable stream without being liable for consequential damages to uplands. Also, uplands, when condemned, may not be valued as a power site, even though this is the highest and best use. But it does not follow that riparian lands are to be valued as if water did not exist. The water does exist and the right to use the uplands for port-site development is an integral part of the value of riparian lands. The statutory control exercised by the government over power sites as compared to port sites

illustrates the difference. Affirmative findings are necessary for a power development, and even then a license is granted subject to many conditions. A riparian owner may use his lands for a port site without restriction unless he is found to be obstructing navigation.

The port-site cases make a distinction between value as between private persons and value as between the Government and a private owner. This Court has held that as between the Government and the riparian owner, a port-site does have value. The value may be diminished as a consequence of a proper exercise of control under the Commerce Clause of the Constitution. However, the Government in this case is not diminishing the value as a consequence of its exercise of control under the Commerce Clause, but it is seizing the whole fee at its undiminished value.

The Government chooses to ignore the difference between frustrating the use of riparian land as a port-site and seizing the land in fee. It fails to distinguish between the *right* to control commerce and navigation, and the *ownership* of commerce and navigation. If the Government's position is correct that it *owns* commerce, what is to stop it from claiming all means of commerce without compensation? The constitution provides that congress shall have the power "to regulate commerce * * *" not own it.

Congressional policy lends further support for full compensation to the respondents as expressed in the water policy for Western States in the Submerged

Lands Act. Congress specifically excludes power site value and reserves navigation control. While granting all rights of development of lands to the states or their private grantees, the fair implication is that port-site value is not excluded, but confirmed in the private owner subject to the control of navigation by the Federal Government.

ARGUMENT

1. The Constitutional requirement of just compensation may not be diminished by the navigational control when the uplands are seized in fee.

Fifth Amendment just compensation for water-front property is the paramount issue in this case. The Government urges that two relatively recent decisions by this Court, *United States* v. *Virginia Elec. Power Co. (Vepco)*, 365 U.S. 624 (1960) and *United States* v. *Twin City Power Co.*, 350 U.S. 222 (1956), bar full compensation here.

Justice Douglas has described the problem:

> Basically the problem in this case is to locate a workable and reasonable boundary between Congress' power to control navigation in the public interest and the rights of landowners adjacent to navigable streams and their tributaries to compensation for injuries flowing from the exercise of that power. The Constitution does not require compensation for all injuries inflicted by the exercise of Congress' power. Neither is the power unlimited. The line therefore must be drawn in accommodation of the two interests.

United States v. *Kansas City Life Ins. Co.*, 339 U.S. 799, 812, 813 (1950) (dissenting opinion).

The need to establish the line mentioned by Justice Douglas is explained in part by Chief Judge Hutcheson of the Fifth Circuit:

> This is a period of great governmental expansion, with enormously stepped up numbers of takings of private property for public use by expropriation, a streamlining of the procedures for taking, and, because familiarity breeds contempt, a consequent growing and, therefore alarming attitude of complacency, instead of viewing with alarm, with which government and public alike look upon the exertion of the power of eminent domain by which all that a man has can be taken from him by force. (footnote omitted.)

Slattery Co. v. *United States*, 231 F.2d 37, 41-42 (5th Cir. 1956).

The taking of respondents' lands was for navigational purposes. Therefore we start with the proposition that the Federal Government exercises almost absolute dominion over navigation through the Commerce Clause of the Constitution. But the extent of power claimed by the government in the present case is not generally available under the Commerce Clause.

> It is not the broad constitutional power to regulate commerce, but rather the servitude derived from that power and narrower in scope, that frees the government from liability in these cases. When the government exercises this servitude, it is exercising its paramount power in the interest of navigation, rather than taking the private property of anyone.

United States v. *Kansas City Life Ins. Co.*, 339 U.S. 799, 808 (1950).

What is described as a "classic description" (Vepco, supra, at 628) of the scope of the power is found in *United States* v. *Chicago, M. St. P. & P. R. R.*, 312 U.S. 592, 596-97 (1941):

> The dominant power of the federal government, as has been repeatedly held, extends to the entire bed of a stream, which includes the lands below ordinary high-water mark. The exercise of the power within these limits is not an invasion of any private property right in such lands for which the United States must make compensation. (Citations omitted.) The damage sustained results not from a taking of the riparian owner's property in the stream bed, but from the lawful exercise of a power to which that property has always been subject.

The dominion of the Federal government over navigable waters must be in furtherance of navigation. *International Paper Co.* v. *United States*, 282 U.S. 399 (1931). The leading case defining the rights of the government to take property in the bed of a stream without compensation affirmed the legal *title* to the bed of a stream in the riparian owner. *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913). Both *Twin City*, supra, and *Vepco*, supra, are decisions based upon the *Chandler-Dunbar* definition of the Government's control of navigation.

International Paper, supra, awarded compensation for the exact value for which *Chandler-Dunbar*

denied compensation; i.e., the value in the flow of the stream. The reason was International's rights to the water under New York law had been curtailed by the Federal Government in a taking under the war power as opposed to the navigation power. This Court commented, in denying the Government's argument that the water right was a mere revocable license, that the "Secretary of War did not attempt to pervert the powers given to him in the interest of naivgation and international duties to such an end." Id. at 407.

Proper government exercise of the navigational servitude within the bed of a stream may cause real economic loss to riparian owners. This is not, however, a taking within the meaning of the Fifth amendment because the damage is consequential. Riparian rights of uplands or fast lands may be diminished in a similar manner without compensation because there has been no taking. See, e.g., *United States* v. *Commodore Park*, 324 U.S. 386 (1945); *Greenleaf-Johnson Lumber Co.* v. *Garrison*, 237 U.S. 251 (1915); *Scranton* v. *Wheeler*, 179 U.S. 141 (1900); *Gibson* v. *United States*, 166 U.S. 269 (1897).

Each of these cases involved damage to uplands caused by a navigational improvement within the bed of the stream. In both *Scranton* and *Gibson*, the riparian property was made less valuable when the government constructed docks and wharves which blocked convenient access to navigable waters. The movement of the harbor line required the destruction of Greenleaf-Johnson Lumber Co.'s lawful dock without com-

pensation. Material dredged from the bay blocked a small navigable stream which fronted the claimant's property in the *Commodore Park* case. But in each of these cases there was no taking. The injuries were consequential, resulting from an exercise of the navigational servitude *within* navigable waters.

In *Chandler-Dunbar*, supra, the company owned power structures in the St. Mary's River. The structures were condemned. The Court denied compensation for the value of the flow of the river in which they were located, and for the value of the structures themselves. In allowing the taking and denying compensation, the Court relied principally upon the navigational servitude, but the original permits allowing the structures were expressly made revocable with or without cause by the Secretary of War.

Chandler-Dunbar was the leading case on the subject until *United States* v. *Twin City Power Co.*, supra. The power company had assembled much of the land needed to develop a hydro-electric facility on the Savannah River. Permission of the Secretary of War and licenses from the Federal Power Commission had been obtained but had been allowed to lapse. Reinstatement of the permits and licenses was not sought until after the United States had decided to build the project itself. Increased value of the upland as a power site was denied. This Court pointed out that the upland owner was seeking a value in the "flow of the stream," and this was not allowable under the *Chandler-Dunbar* decision.

The most recent opinion by this Court in this area is *United States* v. *Virginia Elec. & Power Co.* (Vepco, supra). A flowage easement over fast lands which Vepco had acquired to build a private dam was taken. The sole question was compensation; the easement was indisputably property. The Government (and a dissent by Justices Whittaker and Black and Chief Justice Warren, 365 U.S. at 638) urged that the only value taken was the private right to inundate the lands subject to easement, a value which the government had terminated. The majority found that the easement had "destructive value" in the rights which the easement gave Vepco as against the owner of the subservient fee. Id. at 630. The owner of the subservient fee had conveyed the fee to the Government for $1.00. The Court, obviously struck by the manifest injustice of the Government's position stated: "Compensation could be denied the fee owner because he had already conveyed the flowage easement (citation omitted), and denied the owner of the easement because it was valueless against condemnation by the United States. The Government would thus destroy the entire property interest in fast lands without compensation." Id. at 631.

The dissent answered this by stating: "the law requires us to say: Exactly so." Id. at 643.

Twin City strongly reaffirmed *Chandler-Dunbar* In *Chandler-Dunbar*, value for water power was denied; however, location value of lands adjacent to the St. Mary's River taken for lock and canal purposes

was granted. The *Twin City* dissent, 350 U.S. at 229 (four justices), cited particularly the lock and canal lands award in Chandler-Dunbar, concluding that the majority opinion "extend (s) the government's navigation servitude far above and beyond the high-water mark. * * *" 350 U.S. at 245.

A. Port-site value of lands next to navigable waters should not be eliminated to comply with the rule of Twin City and Vepco that power-site values are to be disregarded.

One writer analyzing the *Twin City* dissent concluded that the portion of *Chandler-Dunbar* dealing with value for lock and canal purposes was overruled by implication by the majority opinion. Fairman, *The Supreme Court*, 1955 Term, 70 Harv. L. Rev. 83, 131, 132 (1956). But Fairman failed to give effect to a footnote on canal and lock lands in the *Twin City* majority opinion. 350 U.S. at n. 1, 226: The *Twin City* footnote explained the lock and canal award:

> It may be that the Court was influenced by the fact that, on the special facts of the case, the use of the land for canals and locks was wholly consistent with the dominant navigation servitude of the United States and indeed aided navigation. Whatever may be said for that phase of the case, it affords no support for respondent, since waterpower value, held to be compensable by the Court of Appeals, was ruled to be non-compensable in the Chandler-Dunbar Case.

To distinguish the location value of lock and canal lands as in *Chandler-Dunbar*, from the use of lands for a port site which is similarly an aid to navigation,

is difficult, if not impossible. The definite exception for water power value, emphasized in the quoted footnote, is in accord with a statutory exception for water power value made in the Submerged Lands Act, 43 U.S.C. § 1301 (e) (1958), discussed in more detail below at page 28 of this brief.

Fairman had this comment on Twin City:

> The government's argument in these cases is plausible on its surface. The United States can deprive the land of its power site value without compensation by diverting the waters or refusing to permit the building of a dam. A subsequent condemnation would require payment only for the diminished value. It is then contended that the result should not be different if the condemnation is contemporaneous with the termination of the private opportunity. This argument disregards the traditional concept of a "taking" within the meaning of the Fifth amendment. The destruction of the value in the first instance is not compensable because it is not such a taking; when the taking is later accomplished by condemnation, the value has already been reduced. But when both destruction of value and condemnation occur at the same time, the worth of the property is not diminished prior to the taking, and just compensation would seem to include the undiminished value.

70 Harv. L. Rev. at 132.

Some inconsistency between *Twin City* and *Vepco* has been suggested. Bickel, *The Supreme Court*, 1960 Term, 75 Harv. L. Rev. 41, 125 (1961). Contra, Note,

Compensable Value "Taking" of Dam Site, 14 Stan. L. Rev. 800, 804-06 (1962) (decisions reconciled with Holfeldian analysis of correlative rights and duties of owners of easement and fee).

However, it is not necessary to question in the slightest degree the holdings in either *Twin City* or *Vepco* to see factual and legal distinctions between the private dam development there thwarted and the private port lands here taken.

First, the character of the use is physically different. Value inherent in a dam site, as observed by Justice Douglas, is in the flow of waters. Power in the flow, the rate, and quantity of water is essential for dam site value. Port site value is not tied to the fact of water moving with power past the lands taken. Water is necessary; indeed, water which is burdened with the navigation servitude is necessary for there to be port site value. But the existence of water is sufficient—it need not have power which is needed for a dam site.

Twin City and *Vepco* involved lands which *could* be used for dams if all the land were assembled, if a federal license were granted, and if many contingencies were satisfied. (Note should be made that at least some of the earlier cases, between *Chandler-Dunbar* and *Twin City*, denied compensation with language that talked of conjectural value because of the improbability that the use would be realized. See, e.g., *United States ex rel, TVA* v. *Powelson*, 319 U.S. 266 (1943); *Olson* v. *United States*, 292 U.S. 246 (1934).)

But the lands in the instant case had present utility as a port site at the time of taking. They had been used as a port site in the past, known as the old Castle Rock Landing. Barge shipping was unloaded in the past on Respondents' lands, and the State of Oregon had secured an option upon their lands for a port site.

Federal power over dam site development is not the same as its power over port site development. Under the Federal Power Act, 16 U.S.C. § 791-a-825r (1958), licenses are granted for a limited term, under specific conditions, with controlled rates, with preferences to states and municipalities, and may be denied altogether if the Federal Power Commission finds that the United States itself should construct the facility for which the private applicant has sought a license. See 16 U.S.C. § 799, 803, 812-13, 800 (a), 800 (b) (1958). The general tenor of the Act is to provide the rules for disposition and use of natural resources which the United States manages in an at least quasi-proprietary capacity. The Supreme Court has said that the judgment of the Federal Power Commission can be upset only when that judgment has no basis in evidence and is devoid of reason. *United States ex rel. Chapman* v. *FPC*, 345 U.S. 153 (1953).

Federal control over private port site development is different. The object of Federal control is to prevent obstructions to navigation. See 33 U.S.C. § 403 (1958). When harbor lines have been established by the Secretary of Army under 33 U.S.C. § 404 (1958), § 403 permits a private person to build

wharves, docks, and landings behind the harbor line. Only when there has been no harbor line established does § 403 require advance application to the Secretary of Army for permission to build port site facilities. Port site use by a property owner is a right subject only to the interests of navigation, accomplished by § 403. *United States* v. *River Rouge Improvement Co.*, 269 U.S. 411 (1926).

In *River Rouge*, this Court set the criteria for reducing the condemnation award for navigation improvement by the increase in value to the remaining property resulting from the improvement. Because the trial court described the Government's control of navigation as being "absolute" and the government had "the right to deprive any riparian owner of all access to the navigable portion of the stream and order the removal of any docks or structures placed in the stream * * *," this Court held the trial court erred. Id. P. 417. This Court further stated that a riparian owner "has, in addition to the rights common to the public, a property right incident to his ownership of the bank, of access from the front of his land to the navigable part of the stream, and when not forbidden by public law may construct landings, wharves or piers for this purpose." 269 U.S. at 418.

Thus the government does not have the same power to restrict port site development that it has to limit the building of dams. To state it in terms of Congressional intent, the statutes prohibit private dam development for a number of different reasons, includ-

ing a finding that the Government itself should develop the dam. Port site development is barred only when it would constitute an obstruction to navigation.

This Court has compared the power of the government over navigation to the power of State government over the use of highways. "The beneficial use and hence the value of abutting property is decreased when a public street or canal is closed or obstructed by public authority * * * but in such cases no private right is infringed." *Reichelderfer* v. *Quinn*, 287 U.S. 315, 319 (1932). The raising of the level of water, reducing the power head at a private dam, was compared to the raising of a highway past a claimant's land—both noncompensable events. *United States* v. *Willow River Power Co.*, 324 U.S. 499, 510-11 (1945).

The application of a similar analogy here requires recovery for port site value. The Government could block access to the land or water highway, or could raise the level of the river without compensation (other than for physical encroachment on the private lands). The taking of the property next to the river without diminishing the value of the property requires compensation for the property according to its value as located next to the river. Certainly, the fact that the river could be closed does not make the land worth only as much as land far from the river. Rather the diminution in value if the river were closed is discounted by the improbability of its happening. This approach is similar to the formula for valuing the

easement held by *Vepco*, although the probability used there was that of the exercise of the easement by the utility. 365 U.S. at 634-36.

There obviously is a point beyond which the Government may not use the navigational servitude to bar just compensation. The Federal Government might seek to value irrigated land as desert land because the water could be cut off in the exercise of the navigation servitude. See Fairman, *The Supreme Court*, 1955 Term, supra, at p. 132.

The example seems absurd. It is absurd because such arbitrary action causing the diminution in value is highly improbable, and would be attended by sanctions, both judicial and political. Fairman, supra. The Government recognized this in its requested charge to the jury in *River Rouge*, supra. The Government said the navigation power cannot be "arbitrarily and capriciously exercised." Id. 418.

This Court has interrelated the question of arbitrary action with property valuation in *United States ex rel. TVA* v. *Powelson*, 319 U.S. 266, 283-84 (1943). The question there presented was valuation of lands acquired for a private dam development, where all the necessary lands had not been acquired. Powelson sought to set up the power of eminent domain held by him to show acquisition of the needed lands was possible. The Court held the power to be a revocable privilege, for which the granting state need not pay if it revoked the license—and therefore the Federal Government need not pay. The Court said:

> A state may of course destroy or diminish values by an assertion of its police power without the necessity of making compensation for the loss. (Citations omitted.) While such a change will not be presumed (United States v. River Rouge Improvement Co., 269 U.S. 411 (1925), the possibility or probability of such action, so far as it affects present values, is a proper subject for consideration in valuing property for purposes of a condemnation award. (Citations omitted.) We do not disturb these general principles. The United States no more than a state can be excused from paying just compensation measured by the value of the property at the time of the taking merely because it could destroy that value by appropriate legislation or regulation.

319 U.S. at 283-84.

The land in the instant case should be valued according to its highest and best use as a port site, taking into consideration the possibility that legitimate government action will prevent port site development. Such a possibility is extremely unlikely. The Government disposed of the property by deed expressly requiring a port to be developed on the tract which includes the lands here in question. The State of Oregon's lease to the Boeing Company of the tract expressly gives the Boeing Company full riparian rights subject to various easements. The possibility of destruction of port site value would thus appear to be virtually nil in the present case.

A persuasive additional reason for allowing port

site value for the lands here in question comes from the general requirement that where part of a private parcel of land is condemned for any river or harbor improvement, the award shall be reduced to the extent of the benefit to the remaining portion from the improvement. See 33 U.S.C. § 595 (1958). It was a provision to this effect which was at the heart of the *River Rouge Improvement Co.* case, supra. In that case the position of the private party and the Government, were the converse of our situation. Land had been taken and there were benefits to the remaining land for improved utilization as a harbor. The Government urged that the benefits to the remaining land for port purposes were not speculative or uncertain, even in view of the navigational servitude.

In *River Rouge*, the Court recognized and cited *Chandler-Dunbar*. In navigational servitude cases, the Court has on occasion distinguished value in land as between private parties and value as between the government and a private owner. See, e.g., *Grand River Dam Auth.* v. *Grand-Hydro*, 335 U.S. 359, 373 (1948); *United States* v. *Willow River Power Co.*, 324 U.S. 499, 511 (1945). But in *River Rouge*, a case involving value between the government and a private owner, the private land was held to have additional value because of its suitability for port development.

It is not only the language of the *River Rouge* opinion which supports respondents' position, but also

the injustice of a contrary holding. It would be a strange result which would allow the Government on one side to take what the landowner would otherwise get by virtue of an improved value, and at the same time deny this identical value, for port purposes, when it takes the land itself. This heads I win, tails you lose approach by the Government does not square with the Fifth Amendment requirement of just compensation.

The New York courts have considered the problem since *Twin City* (and, on appeal, since *Vepco*) and found that while water flow value is to be excluded on condemnation, value by way of location next to water must be paid. *Andrews* v. *State*, 19 Misc. 2d 217, 188 N.Y.S.2d 854 (Ct. Cl. 1959), aff'd, 11 App. Div. 2d 599, 200 N.Y.S.2d 451 (1960), aff'd, 9 N.Y.2d 606, 176 N.E.2d 42, 217 N.Y.S.2d 9, cert. deied, 368 U.S. 929 (1961). The Court said:

> It follows therefore that consideration must be given to the location of this land and its contiguity to the river in arriving at its fair market value. We cannot regard the decisions in United States v. Twin City Power Co. (Citation omitted) and United States v. Chandler-Dunbar Water Power Co. (Citation omitted) as requiring a different result. The effect of these cases is to hold that where property is condemned for use as an integral part of the flow of the stream, condemnee is not entitled to the value of the property when so used, since it is entirely within the power of the Federal government to determine all factors governing the flow of the stream.

> Thus, one part of the decision in United States v. Chandler-Dunbar Water Power Co. dealing with the island owned by St. Mary's Power Co., rejected any value arising from location as a necessary part of a comprehensive system of river improvement. On the other hand, in the same decision, the Court approved the finding of additional value in the strip of land owned by Chandler-Dunbar Water Power Co. arising from its availability and suitability for lock and canal purposes. It seems quite clear that the canal and lock use can only be carried out in an exercise of the sovereign's control over commerce and navigation, and yet the paramount right of the sovereign over the flow of the stream for these purposes would not permit the appropriation of that property without compensation for that aspect of its value.
>
> 19 Misc. 2d at 222, 118 N.Y.S.2d at 860.

Admittedly this was state condemnation, but Federal principles were involved. The only dilution of the quoted analysis is in the suggestion which followed that a contrary interpretation might not be in accord with New York law.

It should be re-emphasized at this point that the suitability of respondents' lands for a port site is historically established. This is the site of the old Castle Rock landing. And the lands were well suited for a port site before the John Day Dam was ever conceived. Further, since the entire parcel of appellant's lands was taken, there is no question of improvement to a privately held residue. This point only simplifies the case, and does not detract from the applicability

of *River Rouge*, nor diminish the injustice of the government's position.

As this Court said in *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 337-38 (1893):

> (A)fter taking this property, the government will have the right to exact the same toll the navigation company has been receiving. It would seem strange that, if by asserting its right to take the property, the Government could strip it largely of its value, destroying all that value which comes from the receipt of tolls, and having taken the property at this reduced valuation, immediately possess and enjoy all the profits from the collection of the same tolls. In other words, by the contention this element of value exists before and after the taking, and disappears only during the very moment and process of taking. Surely, reasoning which leads to such a result must have some vice, at least the vice of injustice.

B. Policy is found in Acts of Congress which indicates that full compensation is to be paid for riparian proprietary rights.

There is reason in the present case to find Congresssional intent to allow full compensation, just as there was in *United States* v. *Gerlach Livestock Co.*, 339 U.S. 725 (1950). There were two bases for the Court's decision there: The exercise of Congressional power did not seem to have been premised on an intent to aid navigation. Also, intent was found to proceed under the Reclamation Act which had provided compensation for interests taken or disturbed

without regard to whether the navigational servitude could be exercised to defeat compensation.

While there is no doubt that the purposes of the John Day Dam include aid to navigation, Congress has chosen to exert less than its full power in aid of navigation in projects in the western states, including Oregon. In its Declaration of Policy, 33 U.S.C. § 701-1 (b) (1959), the navigation power is stated to be limited in favor of uses of navigable waters for several other purposes, including industrial use. The reason behind this policy is doubtless the arid condition of much of the area to which it applies, west of the 98th meridian. The provision shows that at least in this regard, Congress has limited the use of the navigation servitude in the western states.

This difference in policy in the West is reinforced by part of the Submerged Lands Act, 43 U.S.C. § 1311 (e) (1958):

> (e) Nothing in this chapter shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian, relating to the ownership and control of ground and surface water; and the control, appropriation, use and distribution of such waters shall continue to be in accordance with the laws of such States.

The Submerged Lands Act is also directly applicable to the navigable portion of the Columbia River which is involved in the present case. 43 U.S.C. § 1301 (a) (1958); the general declaration of ownership in

sub-section 1311 (a) independently lends weight to the respondents' claim of port site value:

> (a) It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage; administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;

Congress has in mind the navigation power when the Submerged Lands Act as written; sub-section (a) is qualified by an exception for navigation in subsection (d):

> (d) Nothing in this chapter shall affect the use, development, improvement, or control by or under the constitutional authority of the United States of said lands and waters for the purposes of navigation or flood control or the production of power, or be construed as the release or relinquishment of any rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation, or to provide for flood control, or the production of power;

This exception is re-stated in the positive in § 1314 (a), but this sub-section also contains additional reasons for full compensation in the present case:

> (a) The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, *but shall not be deemed to include, proprietary rights of ownership*, or the rights of management, administration, leasing, *use and development of the lands* and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective states and others by section 1311 of this title. (Emphasis supplied.)

The purpose of the Act, as is well known, was to allow the States to make leases for mineral (primarily oil) exploration on the continental shelf under the sea. It is to this end in particular that § 1311 (a), above quoted, confirmed title not only in the lands, but in the natural resources. And section 1301 (e) defines:

> (e) The term "natural resources" includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life *but does not include water power, or the use of water for the production of power;* (emphasis supplied.)

The government states in its Brief that the relevance of the Submerged Lands Act, 43 U.S.C. 1301-1343 is not immediately apparent. It correctly states the intention of the Act to confirm the long recognized title of the States and their grantees to the lands beneath such waters. But the government fails to consider the clear legislative history of the Act and its intended impact upon port proprietary interests.

The legislative history of the Act is discussed at length in *United States* v. *Louisiana*, 363 U.S. 1, 4 L. ed. 2d 1025, 80 S. Ct. 961 (1960), at pages 1038-1040. See footnotes 16 through 18. However, the precise point involved in this case was not then before the Court in *United States* v. *Louisiana*, supra, and, therefore, the Court did not have occasion to explore the legislative history on port proprietary interests in detail.

Senator Holland, the sponsor of S. J. 13, stated (99 Cong. Rec. 2750)*:

> * * * Taking the nation as a whole, there are undoubtedly several billion dollars worth of port facilities alone, located on inland waters, on built-up lands which were once inland waters, so that it is easy to understand why the attorneys general, municipal officers, port authorities and other similar officials, are deeply concerned in

* The debates on this phase of the Submerged Lands Act will be found in 99 Cong. Rec. at pages 2751, 2764, 2765, 2772, 2773, 2816, 2817, 2818, 2819, 2836, 2837, 2843, 2930, 2931, 3004, 3328, 3329, 3334 and 3335. There are, of course, other scattered references in the Congressional Record bearing on this subject but the foregoing are among the most important.

this fight and are insistent that the Congress shall effectually release to the State and their grantees all property rights in the inland waters and their beds, saving only to the Federal government those rights which will enable it to perform its constitutional functions. * * *

Senate Report No. 133, 83rd Congress, 1st Session (Majority Report on Senate Joint Resolution 13) graphically pointed up the concern of the Congress in distinguishing between proprietary interests in port sites vis-a-vis the government's right of control—dominium versus imperium. It stated, in part (p. 6):

> * * * The control by the States of the production of oil and gas from their coastal belts has also created substantial values, which will continue temporarily in a few places for a few years, but such production of oil and gas in the past, present, or future is insignificant in value when compared with the many permanent values which largely determine the development and prosperity of coastal communities and many important industries.
>
> Considering the untold millions of dollars of economic wealth represented in the port and harbor developments of our great coastal cities, in the recreational, residential, and commercial areas of Boston Harbor, Long Island, Staten Island, New Jersey, Florida, California, and elsewhere, and the beginnings of the development of the undersea oil and gas deposits within State boundaries off the Gulf and Pacific coasts, the committee majority is firmly convinced that the State ownership under which all of these and many other development have achieved should

be continued in the public interest and in the furtherance of our Federal-State system.

The Report continues by pointing out that lands under inland waters comprise some 28,960,640 acres. Appendix G to the Report, (Memorandum Brief of the National Association of Attorneys General), states the purpose succinctly at page 81:

> The States admit that the Federal Government has paramount powers over navigable waters to improve and keep them open for public use, and that the Government has paramount constitutional powers of government over these lands for national defense, commerce and international affairs. They ask merely that governmental powers be maintained separate and distinct from proprietorship, and that no exercise of governmental powers be allowed to acquire without compensation resources that have heretofore been considered *as part of and attached to ownership of the soil.* (Emphasis supplied.)

What the National Association of Attorneys General is attempting to do is to make a clear distinction between a Federal government proprietary right and its admitted power of control—again, the distinction between dominion and imperium. No one contends that the Federal Government would have been required to pay compensation to the respondents had it elected to build a dike or jetty in front of their port site properties on the Columbia River. *Scranton* v. *Wheeler*, supra; *Gibson* v. *United States*, supra. No compensation would have been payable if the navi-

gable waters in front of their port-site had been filled in with material dredged from other navigable waters. *United States* v. *Commodore Park*, supra. The Federal Government could have established a harbor line behind the high water mark of respondents' property without paying compensation. *Greenleaf-Johnson Lumber Co.* v. *Garrison*, supra. But the Federal Government elected to do none of these, and instead proceeded under the principles of eminent domain.

The State of Oregon considers riparian rights valuable property rights, including particularly the right to build a pier out to the line of navigability and the right of access to the navigable part of the stream from the front of the land. 3 Will. L. J. 63 (1963). ORS Chapter 780.

We are unable to distinguish this case, involving the applicability of the Submerged Lands Act and the doctrine of riparian rights developed in the State of Oregon from the situation in *Federal Power Commission* v. *Niagara Mohawk Power Corporation*, 347 U.S. 239, 74 S. Ct. 487, 98 L. ed. 666 (1953). In the latter case, this Court held that the Federal Water Power Act, by making express reference to preexisting water rights [as does the Submerged Lands Act], thereby implies that such rights are to survive unaffected by the Act, at least until taken over by purchase or otherwise. This Court also held, in that context, that riparian water rights, like other real propery rights, are determined by state law; title to them is acquired in conformity with that law.

We recognize that at this point in our analysis of the effect of the Submerged Lands Act that the essential question of the degree to which the navigational servitude affects compensation must involve the same test of constitutional navigation power with which we dealt earlier in this brief. But the quoted portions of the Submerged Lands Act add force to respondents' claim of property right in the riparian owner to develop his lands for the economically and socially useful value as a port. This is a right which can be limited only when the attempted exercise of it tends to obstruct navigation (as for example a dock which extends past the harbor line) or when the power over navigation is otherwise properly exercised in a fashion which consequentially limits use of the property, and subject to the limitation that the owner does not have the right to develop a hydroelectric power project.

In the present case there was no such limit on the riparian owner's rights in his lands. It is conceded that the Government could have made respondents' lands less valuable without becoming constitutionally liable for compensation, but it is established that no such action was ever taken. Rather, we have an admitted taking of the lands and of the proprietary right to use the lands for a port. The lands were taken and, in fact, were then incorporated in a larger tract which was transferred to the State of Oregon for use as a port . . . a tract which Oregon had already leased, in anticipation of acquisition, to a private corporation.

> The question presented is not whether the United States had the power to condemn and appropriate this property . . . for that is conceded, but how much it must pay as compensation therefore. Obviously, this question, as all others which run along the line of the extent of the protection the individual has under the Constitution against the demands of the government, is of importance; for in any society the fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government. The first ten amendments to the Constitution, adopted as they were soon after the adoption of the Constitution, are in the nature of a bill of rights, and were adopted in order to quiet the apprehension of many, that without some such declaration of rights the government would assume, and might be held to possess, the power to possess, the power to trespass upon those rights of persons and property which by the Declaration of Independence were affirmed to be unalienable rights.
>
> * * * * * *
>
> It in no way detracts from the power of the public to take whatever may be necessary for its uses; while, on the other hand, it prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.

Monongahela Navigation Co. v. *United States*, 148 U.S. 312, 324-25 (1893).

CONCLUSION

The respondents should be allowed to show, in accordance with the general law, the highest and best use of their lands; i.e., a port-site. This use, not speculative since the lands had been used as a port site in the past, is subject to the navigation servitude to the extent that the Government properly acts within the bed of the stream in aid of navigation. But here nothing was done by the Government to diminish the value of this land. Rather, the land was taken for use as a port site, and port site value should be allowed the owners. This Court has held that as between the Government and a private owner, the riparian right to develop a port is a valuable property right. For this, Constitutional just compensation must be paid. This conclusion is reinforced by the grant in the Submerged Lands Act of the right to develop all natural resources, excepting only power-site development, and subject only to the navigation servitude. Here there was a taking of the lands at their full value. Full compensation should be allowed.

The Court of Appeals should be affirmed and the case remanded to the District Court for a new trial on the issue of just compensation, allowing evidence of port-site value.

Respectfully submitted,

SIDNEY TEISER
Of Counsel:
ALEX L. PARKS
ROBERT ABRAMS of
MAHONEY & ABRAMS

September, 1967

APPENDIX A

Lease between the State of Oregon and The Boeing Co., of record in Morrow County, Oregon, Deed Book 70, pp. 241-74.

Appendices to this lease are omitted from this Appendix.

LEASE

This Lease made as of the 2nd day of July, 1963, by and between the State of Oregon, acting by and through the State Land Board, Lessor ("the State"), and The Boeing Company, a Delaware corporation, Lessee ("the Company"), witnesseth that:

RECITALS

A. Part of the lands described in Schedule A hereto ("the premises") now are owned by the State; part of the premises now are owned by the United States of America acting by and through the Department of the Navy ("Navy"); part of the premises now are owned by the United States of America acting by and through the Department of Interior ("Interior") and the Corps of Engineers ("the Corps").

B. Navy is empowered by Section 207 of Public Law 86-500, 74 Stat. 166, 175, The Reserve Forces Facilities Act of 1960, as amended by Public Law 87-356, 75 Stat. 777, to convey to the State Navy lands within the premises ("Navy lands") in ex-

change for the State's conveyance to Navy of other lands and facilities suitable for Navy purposes. A complete substitute facility has been provided and is available for use by Navy.

C. The Corps has authority and has taken steps to acquire the Interior lands within the premises and is empowered by Section 108 of Public Law 86-645, 74 Stat. 480, to convey to the State the Corps and Interior lands within the premises ("Corps lands") subject to a standard flowage easement and subject to reversion to the Corps in the event of non-use or substantial departure from an approved plan of development.

D. The State has been granted legislative authority to marshal and acquire Navy and Corps lands and has taken preliminary steps to acquire these lands.

E. Pending acquisition of the Navy and Corps lands, the State has obtained permission from Navy, Interior, and the Corps for the State and its lessees to go upon the Navy and Corps lands.

F. Upon acquiring the premises, and pursuant to legislative authority, the State proposes to lease the premises to the Company and the Company desires to rent the premises from the State upon the terms and conditions set forth hereinafter.

. . . . . .

8. *Waterfront Property.* The parties hereto recognize that the State's title to the waterfront property within the premises is subject to certain condi-

tions and use restrictions as set forth in Schedule B. Notwithstanding this, the Company shall have unrestricted use of the waterfront property and full riparian rights in conjunction therewith, and the State shall exercise every effort to secure, preserve and protect such rights. The State's failure to perform its obligations pursuant to this paragraph 8, or any interference, of any nature and from whatever source, with the Company's intended or desired industrial use or development of the waterfront property, whether or not such intended or desired industrial use or development is consistent with an approved plan of development, shall constitute a breach of the State's covenant of quiet and peaceful possession, use and enjoyment pursuant to subparagraph 4(a) of Article II hereinabove. The State's obligation with respect to waterfront property shall include but not be limited to the following:

(a) The State shall use every effort to secure approval by the Corps, or its successors in interest, of any proposed plan or amendment to existing plans for development or use of the waterfront property which may be requested by the Company.

(b) The State shall use every effort to acquire and make application for any additional waterfront property contiguous with or adjacent to the premises which the Company may require or desire for use or development for industrial or port facilities in conjunction with the use of the premises by the Company or its subtenants.

(c) The State shall use every effort to acquire and make application for any and all additional waterfront property contiguous with or adjacent to the premises which are or may become available pursuant to Section 108 of Public Law 86-645, 74 Stat. 480, or any other or similar legislation presently in force or hereafter enacted.

SUPREME COURT OF THE UNITED STATES

No. 54.—October Term, 1967.

United States, Petitioner, v. R. B. Rands et ux.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[November 13, 1967.]

Mr. Justice White delivered the opinion of the Court.

In this case the Court is asked to decide whether the compensation which the United States is constitutionally required to pay when it condemns riparian land includes the land's value as a port site. Respondent owned land along the Columbia River in the State of Oregon. He leased the land to the State with an option to purchase, it apparently being contemplated that the State would use the land as an industrial park, part of which would function as a port. The option was never exercised, for the land was taken by the United States in connection with the John Day Lock and Dam Project, authorized by Congress as part of a comprehensive plan for the development of the Columbia River. Pursuant to statute [1] the United States then conveyed the land to the State of Oregon at a price considerably less than the option price at which respondent had hoped to sell. In the condemnation action, the trial judge determined that the compensable value of the land taken was limited to its value for sand, gravel, and agricultural purposes and that its special value as a port site could not be considered. The ultimate award was about one-fifth the claimed value of the land if used as a port. The Court of Appeals for the Ninth Circuit reversed, apparently holding that the Government had taken from respondent a compensable right of access to navigable waters and

[1] 74 Stat. 486 (1960), 33 U. S. C. § 578.

concluding that "port site value should be compensable under the Fifth Amendment." 367 F. 2d 186, 191 (1966). We granted certiorari, 386 U. S. 989, because of a seeming conflict between the decision below and *United States* v. *Twin City Power Co.*, 350 U. S. 222 (1956). We reverse the judgment of the Court of Appeals because the principles underlying *Twin City* govern this case and the Court of Appeals erred in failing to follow them.

The Commerce Clause confers a unique position upon the Government in connection with navigable waters. "The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States . . . . For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress." *Gilman* v. *Philadelphia*, 70 U. S. (3 Wall.) 713, 724–725 (1865). This power to regulate navigation confers upon the United States a "dominant servitude," *FPC* v. *Niagara Mohawk Power Corp.*, 347 U. S. 239, 249 (1954), which extends to the entire stream and the stream bed below ordinary high-water mark. The proper exercise of this power is not an invasion of any private property rights in the stream or the lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592, 596–597 (1941); *Gibson* v. *United States*, 166 U. S. 269, 275–276 (1897). Thus, without being constitutionally obligated to pay compensation, the United States may change the course of a navigable stream, *South Carolina* v. *Georgia*, 93 U. S. 4 (1876), or otherwise impair or destroy a riparian owner's access to navigable waters, *Gibson* v. *United States*, 166 U. S. 269 (1897); *Scranton* v. *Wheeler*, 179

U. S. 141 (1900); *United States* v. *Commodore Park, Inc.*, 324 U. S. 386 (1945), even though the market value of the riparian owner's land is substantially diminished.

The navigational servitude of the United States does not extend beyond the high-water mark. Consequently, when fast lands are taken by the Government, just compensation must be paid. But "just as the navigational privilege permits the Government to reduce the value of riparian lands by denying the riparian owner access to the stream without compensation for his loss, it also permits the Government to disregard the value arising from this same fact of riparian location in compensating the owner when fast lands are appropriated." *United States* v. *Virginia Elec. & Power Co.*, 365 U. S. 624, 629 (1961). Specifically, the Court has held that the Government is not required to give compensation for "water power" when it takes the riparian lands of a private power company using the stream to generate power. *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 73–74 (1913). Nor must it compensate the company for the value of its uplands as a power plant site. *Id.*, at 76. Such value does not "inhere in these parcels as upland," but depends on use of the water to which the company has no right as against the United States: "The Government had dominion over the water power of the rapids and falls and cannot be required to pay any hypothetical additional value to a riparian owner who had no right to appropriate the current to his own commercial use." *Ibid.*

All this was made unmistakably clear in *United States* v. *Twin City Power Co.*, 350 U. S. 222 (1956). The United States condemned a promising site for a hydroelectric power plant and was held to be under no obligation to pay for any special value which the fast lands had for power generating purposes. The value of the land attributable to its location on the stream was "due

to the flow of the stream; and if the United States were required to pay the judgments below, it would be compensating the landowner for the increment of value added to the fast lands if the flow of the stream were taken into account." 350 U. S., at 226.

We are asked to distinguish between the value of land as a power site and its value as a port site. In the power cases, the stream is used as a source of power to generate electricity. In this case, for the property to have value as a port, vessels must be able to arrive and depart by water, meanwhile using the waterside facilities of the port. In both cases, special value arises from access to, and use of, navigable waters. With regard to the constitutional duty to compensate a riparian owner, no distinction can be drawn. It is irrelevant that the licensing authority presently being exercised over hydroelectric projects may be different from, or even more stringent than, the licensing of port sites. We are dealing with the constitutional power of Congress completely to regulate navigable streams to the total exclusion of private power companies or port owners. As was true in *Twin City*, if the owner of the fast lands can demand port site value as part of his compensation, "he gets the value of a right that the Government in the exercise of its dominant servitude can grant or withhold as it chooses. . . . To require the United States to pay for this . . . value would be to create private claims in the public domain." 350 U. S., at 228.

Both respondent and the Court of Appeals have found *Twin City* inconsistent with the holding in *United States v. River Rouge Improvement Co.*, 269 U. S. 411 (1926). In that case, the Government took waterfront property to widen and improve the navigable channel of the River Rouge. By reason of the improvements, other portions of the riparian owner's property became more valuable because they were afforded direct access to the stream

for the building of docks and other purposes related to navigation. Pursuant to § 6 of the Rivers and Harbors Act of 1918,[2] the compensation award for the part of the property taken by the Government was reduced by the value of the special and direct benefits to the remainder of the land. The argument here seems to be that if the enhancement in value flowing from a riparian location is real enough to reduce the award for another part of the same owner's property, consistency demands that these same values be recognized in the award when any riparian property is taken by the Government. There is no inconsistency. *Twin City* and its predecessors do not deny that access to navigable waters may enhance the market value of riparian property. See *United States* v. *Commodore Park, Inc.*, 324 U. S., at 388, 390. And, in *River Rouge*, it was recognized that state law may give the riparian owner valuable rights of access to navigable waters good against other riparian owners or against the State itself. 269 U. S., at 418–419. But under *Twin City* and like cases, these rights and values are not assertable against the superior rights of the United States, are not property within the meaning of the Fifth Amendment, and need not be paid for when appropriated by the United States. Thus, when only part of the property is taken and the market value of the remainder is enhanced by reason of the improvement to navigable waters, reducing the award by the amount of the increase in value simply applies in another context the principle that special values arising from access to a navigable stream are allocable to the public, and not to private interest. Otherwise the private owner would receive a windfall to which he is not entitled.

Our attention is also directed to *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312 (1893), where

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[2] 40 Stat. 911, 33 U. S. C. § 595.

it was held that the Government had to pay the going-concern value of a toll lock and dam built at the implied invitation of the Government, and to the portion of the opinion in *Chandler-Dunbar* approving an award requiring the Government to pay for the value of fast lands as a site for a canal and lock to bypass the falls and rapids of the river. *Monongahela* is not in point, however, for the Court has since read it as resting "primarily upon the doctrine of estoppel. . . ." *Omnia Commercial Co., Inc.* v. *United States,* 261 U. S. 502, 513–514 (1923). The portion of *Chandler-Dunbar* relied on by respondent was duly noted and dealt with in *Twin City* itself, 350 U. S. 222, 226, n. * (1956). That aspect of the decision has been confined to its special facts, and, in any event, if it is to any extent inconsistent with *Twin City,* it is only the latter which survives.

Finally, respondent urges that the Government's position subverts the policy of the Submerged Lands Act,[3] which confirmed and vested in the States title to the lands beneath navigable waters within their boundaries and to natural resources within such lands and waters, together with the right and power to manage, develop, and use such lands and natural resources. However, reliance on that Act is misplaced, for it expressly recognized that the United States retained "all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership. . . ."[4] Nothing in the Act was to be construed "as the release or relinquishment of any rights of the United States arising under the

[3] 67 Stat. 29 (1953), 43 U. S. C. §§ 1301–1343.
[4] 67 Stat. 32 (1953), 43 U. S. C. § 1314.

constitutional authority of Congress to regulate or improve navigation, or to provide for flood control, or the production of power."[5] The Act left congressional power over commerce and the dominant navigational servitude of the United States precisely where it found them.

For the foregoing reasons, the judgment of the Court of Appeals is reversed and the case remanded with direction to reinstate the judgment of the District Court.

Reversed and remanded.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

[5] 67 Stat. 31 (1953), 43 U. S. C. § 1311 (d).